Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 2004

DIANE SANK,

Petitioner,

v.

THE CITY UNIVERSITY OF NEW YORK, ET AL,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Diane Sank
Petitioner *Pro Se*
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QUESTIONS PRESENTED

I. Whether the New York City Commission on Human rights (a municipal agency), its Commissioner, and staff attorneys may be dismissed on the ground of qualified immunity from an action based on Constitutional violations of due process and equal protection?

II. Whether leave to file an immediate interlocutory appeal should be granted when the New York City Commission on Human rights (a municipal agency), its Commissioner, and staff attorneys are dismissed on the ground of qualified immunity from an action based on Constitutional violations of due process and equal protection?

III. Whether the New York City Commission on Human rights (a municipal agency), its Commissioner, and staff attorneys have absolute immunity from suit?

IV. Whether agents of an employer may be sued and held individually liable for their violations of Title VII, 42 U.S.C. § 2000e-2 (employment discrimination) and 42 U.S.C. § 2000e-3 (retaliation)?

V. Whether the City University of New York has 11th Amendment immunity from suit as an "arm of the state?"

VI. Whether liability for employment discrimination, pursuant to Title VII, 42 U.S.C. § 2000e-2, attaches if one of the motivating reasons given for the discriminatory act is discriminatory and other reasons are arguably non-discriminatory?

VII. Whether dismissals of Title VII claims on motions for summary judgment are appropriate when heightened standards of review and evidentiary standards of review are used instead of the standard of Rule 56(e) of the Federal Rules of Civil Procedure, i.e. does a genuine issue as to material fact exist?

VIII. Whether the supervisory power of the Supreme Court should be applied to a federal Court of Appeals decision which held that all of Petitioner-Appellee's arguments were without merit but due to the brevity of their decision, denied Petitioner and this Supreme Court the benefit of their reasoning as to how the relevant laws and case precedents applied to the facts and issues raised below in the instant case.?

LIST OF PARTIES

Pro se Petitioner, Diane Sank ("Sank" or "Petitioner"), is a white woman, over the age of 73, who is a Professor of Anthropology, employed as such since 1968 by the City College of the City of New York ("CCNY") which a satellite college of the City University of New York. At all times mentioned in the complaint, she was and still is a resident of New Jersey and a citizen of the United States.

These following are Respondents including individuals sued in both their official and individual capacities:

The City University of New York ("CUNY"),

Defendant Joseph S. Murphy, CUNY Chancellor from 1987 to 1990,

W, Ann Reynolds, CUNY Chancellor beginning in September 1990,

James P. Murphy, CUNY Board of Trustees Chair from 1987 until the complaint was filed in this action,

The CUNY Board of Trustees of CUNY as constituted in April of 1988, including Paul P. Baard, Blanche Berstein, Sylvia Bloom, Maria Josefa Canino, Louis C. Cenci, Armand D'angelo, Judah Griebetz, William R. Howard, Harold M. Jacobs, Flerida Negron, Robert L. Polk, Joaquin Rivera, J.D., Margaret A. Titone, Shirley Ullman Wedeen, and Brenda Farrow White;

The CUNY Board of Trustees of CUNY as constituted in c. June and c. September of 1989, including Gladys Carion, Michael J. Del Guidice, Edith B. Everett, Stanley Fink, Charles E. Innis, Jean C. Lamarre, Susan Moore Mourner, Abdullah Muhammad, Gregorio Mayers, Robert A. Pickens, Calvin O. Pressley, Ronald Quartimon, and Thomas Tam;

The CUNY Board of Trustees as constituted c. June 1990 through the April, 1992 term of office;

Bernard Harleston was the President of CCNY,

Jeffrey R. Rosen was Dean, Division of Social Science , CCNY,

Anthony F. Rodriquez, a/k/a Pacheko, Assistant Vice President of Facility and Space Planning of CCNY,

Carole Laderman, Chair and Professor in the Department of Anthropology (the "Department") of CCNY,

Fremont E. Besmer, Professor of Anthropology and Acting Department Chair in 1989-90 and 1992-93 at CCNY,

June Nash was a Professor, Professor of Anthropology from 1971 until c.1998 at CCNY,

Beverly Sowande, Associate Counsel in CUNY's General Counsel's Office and its Freedom of Information Appeals Officer,

The Commission on Human Rights of the City of New York ("Commission"),

Dennis Deleon, Commissioner in the Commission,

Randolph ("Randy") Wills, Esq., Managing Attorney in the Commission's Law Enforcement Bureau,

Stephanie Orteleiva, Esq., Supervising Attorney in the Commission's Law Enforcement Bureau, and

Lizbeth Schalet, Esq., Attorney in the Commission's Law Enforcement Bureau.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS AND ORDERS ENTERED BELOW 1

JURISDICTIONAL STATEMENT 3

CONSTITUTIONAL PROVISIONS, LESSER LAWS AND REGULATIONS INVOLVED 4

STATEMENT OF THE CASE 4

PAGE

REASONS FOR GRANTING PETITION 11

I. THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO SETTLE AN IMPORTANT FEDERAL QUESTION WHICH THREATENS THE INTEGRITY AND UNDERMINES PUBLIC CONFIDENCE IN HUMAN RIGHTS LAW: WHETHER THE COMMISSION, ITS COMMISSIONER AND STAFF ATTORNEYS HAVE ABSOLUTE IMMUNITY FOR THEIR INVESTIGATORY AND ADMINISTRATIVE ACTIONS WHICH KNOWINGLY VIOLATE A COMPLAINANT'S CONSTITUTION RIGHTS TO DUE PROCESS AND EQUAL PROTECTION 11

II. THIS COURT SHOULD GRANT CERTIORARI TO SETTLE THE IMPORTANT FEDERAL QUESTION OF WHETHER THE CLEARLY EXPRESSED LANGUAGE OF 42 U.S.C. § 2000e SUBJECTS EMPLOYER'S AGENTS TO INDIVIUAL LIABIITY FOR THEIR DISCRIMINATORY ACTS 15

III. THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO SETTLE THE IMPORTANT FEDERAL QUESTION OF WHAT FACTORS MUST BE CONSIDERED BEFORE COURTS ACCORD TO A UNIVERSITY 11TH AMENDMENT IMMUNITY AS AN "ARM OF THE STATE." 18

IV. THIS COURT SHOULD GRANT CERTIORARI TO SETTLE IMPORTANT FEDERAL TITLE VII QUESTIONS AS TO WHETHER 42 U.S.C. § 2000E–2(M) APPLIES TO CASES WHERE A DEFENDANT ADVANCES DISCRIMINATORY AND NON-DISCRIMINATORY REASONS FOR HIS OR HER DISCRIMINATORY ACT, AND IN ADDITION, WHETHER THE LEGITIMACY OF THE REASONS, PURSUANT TO *MCDONNELL DOUGLAS CORP. V. GREEN,* BE A FACTOR 22

REASONS FOR GRANTING PETITION continued

PAGE

V. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE STANDARD OF REVIEW FOR SUMMARY JUDGMENT AS DISTINQUISHED FROM A HEIGHTENED STANDARD, AND EVIDENTIARY STANDARD..... 25

VI. THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO EXERCISE SUPERVISORY POWER OVER LOWER COURTS TO INSTRUCT THEM ON THE ABUSE OF ISSUING UNPUBLISHED OPINIONS THAT ARE BEREFT OF ANALYSIS AND REASONING APPLIED TO THE ISSUES REVIEWED, THEREBY BURDENING A PETITIONER AND MAKING THIS COURT'S REVIEW UNNECESSARILY DIFFICULT..... 29

CONCLUSION..... 30

APPENDICES

APPENDIX A..... 1a-110a

APPENDIX B..... 111a-200a

APPENDIX C..... 201a-247a

TABLE OF AUTHORITIES

CASES PAGE

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)..... 16

Behrens v. Pelletier, 516 U.S. 299 (1996)..... 11

Brennan v. University of Kansas, 451 F.2d 1287 (10th Cir. 1971)..... 21

Broomfield v. Lundell, 767 P.2d 697 (Ariz. Ct. App. 1988). 17

Buckley v. Fitzsimmons, 113 S. Ct. 2606 (1993)..... 13

Butz et al. v. Economou et al., 438 U.S. 478 (1978)..... 14

TABLE OF AUTHORITIES continued

CASES PAGE

Carr v. U.P.S., 955 S.W.2d 832, 838 (Tenn. 1997).....18
Celotex Corp. v. Catrett, 477 U.S. 317 (1986).....29
Clark Co. Sch. Dist. v. Breeden, 532 U.S. 268 (2001).....27
Clissuras v. City Univ. of N.Y., 359 F3d 79 (2d Cir. 2004)..19
Comiskey v. Auto. Indus, Action Group, 40 F. Supp. 2d 877 (E.D. Mich. 1999).....17
Desert Palace, Inc. v. Costa, 123 S.Ct. 2148 (2003).....23
Dici v. Pennsylvania, 91 F.3d 542 (3d Cir. 1996).....17
Doe v. Lawrence Livermore National Laboratory, 65 F.3d 771 (9th Cir. 1995).....21
Douglas Corp. v. Green, 411 *U.S.* 792, 802-03 (1973).....22
Estate of Cowart v. Nicklos Drilling, 112 S. Ct. 2589 (1992).....18
Garcia v. Board of Educ., 777 F.2d 1403 (10th Cir. 1985)..21
Gary v. Long, 59 F.3d 1391 (D.C. Cir. 1995).....17
Gastineau v. Fleet Mortgage Corp., 137 F.3d 490 (7th Cir. 1998).....17
Genaro v. Cent. Transp., Inc., 703 N.E.2d 782 (Ohio 1999)17
Gibbs-Alfano v. Burton, 281 F.3d 12 (2d Cir. 2002).....29
Gonzales v. Mountainaire Pub. Schs., No. 93-2297, 1994 WL 599514 (10th Cir. 1994).....21
Griffith v. Keystone Steel & Wire Co., 858 F. Supp. 802 (C.D. Ill. 1994).....17
Griggs v. Duke Power Co., 401 *U.S.* 424 (1971).....23
Hadley v. North Arkansas Community Technical College, No. 94-3703 (8th Cir. 1996).....21
Hall v. Medical College of Ohio at Toledo, 742 F.2d 299, 302-07 (6th Cir. 1984).....21
Harlow v. Fitzgerald, 457 U.S. 800 (1982.....13
Hiller v. Brown, 177 F.3d 542, 545 (6th Cir. 1999).....17
Indest v. Freeman Decorating, Inc., 164 F.3d 258, 267 (5th Cir. 1999).....17

TABLE OF AUTHORITIES continued

CASES **PAGE**

Johnson v. Transportation Agency, 480 U.S. 616 (1987).... 23
Kashani v. Purdue Univ., 813 F.2d 843 (7th Cir. 1987).....21
Lamirande v. Resolution Trust Corp.,
834 F. Supp. 526 (D.N.H. 1993).....17
Lenhardt v. Basic Inst. of Tech., Inc.,
55 F.3d 377 (8th Cir. 1995) 17
Lewis v. Midwestern State Univ.,
837 F.2d 197 (5th Cir. 1987) 20
Lillard v. Shelby County Board of Education,
No. 94-5694 (6th Cir. 1996) 21
Lissau v. S. Food Serv. Inc., 159 F.3d 177 (4th Cir. 1998)...17
Maestas v. Board of Educ., 749 F.2d 591 (10th Cir. 1984)..21
Mandell v. County of Suffolk, 316 F.3d 368 (2d Cir. 2003)..16
Martinez v. Board of Educ., 748 F.2d 1393 (10th Cir. 1984)21
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S.
574, (1986).....29
McDonald v. Santa Fe Trail Transp. Co.,
427 *U.S.* 273 (1976).....23
McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973).....23, 24
Meara v. Bennett, 27 F. Supp. 2d 288 (D. Mass. 1998).....17
Mitchell v. Forsyth, 472 U. S. 511 (1985) 11, 13
Monell v. New York City Dept. of Social Services,
436 U.S. 658 (1978).....13, 15
Morris v. N.Y. City Dept. of Sanitation,
2003 U.S. Dist. LEXIS 5146; 91 Fair Empl. Prac
. Cas. (BNA) 942 (S.D.N.Y 2003).....25
Owens v. Okure, 488 U.S. 235, 102 (1988) 8
Palace, Inc. v. Costa, 123 *S. Ct.* 2148 (2003).....23
Pink v. Modoc Indian Health Project, Inc.,
157 F.3d 1185 (9th Cir. 1998) 17
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).....25

TABLE OF AUTHORITIES continued

CASES **PAGE**

Regents of the University of California v. Doe, 519 U.S. 425 (1997) 18

Regents of the University of California v. John Doe, 519 *U.S.* 425 (1997) 9, 21

Richardson v. Southern University, 118 F.3d 450 (5th Cir. 1997) .....20.

Robinson v. Cattaraugus County, 147 F.3d 153, 164-65 (2d Cir. 1998) 27

Rodriguez v. City of New York, 72 F.3d 1051 (2d Cir. 1995).....29

Rudow v. City of N.Y., 822 F.2d 324 (2d Cir. 1987).....11

Sank v. City Univ. of N.Y, 1995 U.S. Dist. LEXIS 7021, 1995 WL 314696 (S.D.N.Y. 5/24/1995) 2, 8

Sank v. City Univ. of N.Y, 1997 U.S. Dist. LEXIS 9045 (S.D.N.Y. 6/26/1997) 2, 9, 16

Sank v. City Univ. of N.Y, 1997 U.S. Dist. LEXIS 1468, 1997 WL 65910 (S.D.N.Y. 2/13/1997) 2, 8

Sank v. City Univ. of N.Y, 219 F. Supp. 2d 497 LEXIS 14034 (S.D.N.Y. 8/2/2002) 2, 10

Sank v. City Univ. of N.Y., 94 Civ. 0253 (RWS), LEXIS 1 4032 (S.D.N.Y. 8/2/2002).....3, 10, 26

Sank v. City Univ. of N.Y., 94 Civ. 0253 (RWS), LEXIS 5928 (S.D.N.Y. 4/5/2002) 2, 9, 18

Sank v. City Univ. of N.Y., 94 Civ. 0253 (RWS), LEXIS 6253 (S.D.N.Y. 4/15/2002) 9

Sank v. City Univ. of N.Y., 94 Civ. 0253 (RWS), 5471 (S.D.N.Y. 4/4/2003).....3, 10, 28

Sank v. City Univ. of N.Y., 94 Civ. 0253 (RWS), LEXIS 10396 (S.D.N.Y. 6/19/2003) 3, 10

Sank v. City Univ. of N.Y., 03-7677-cv (L), 03-7678-cv (CON), LEXIS 17245 (2nd Cir. 8/17/2004) 3, 8, 16, 19

Sauers v. Salt Lake County, 1 F.3d 1122 (10th Cir. 1993)...17

TABLE OF AUTHORITIES continued

CASES	PAGE
Scheuer v. Rhones, 416 U.S. 232 (1974)	8
Schram v. Alberton's, Inc., 934 P.2d 483 (Or. Ct. App. 1997)	17
Sharlene K. Watson, v. University of Utah Medic, 75 F.3D 569 (10th Cir. 1996)	21
Silver v. City Univ., 947 F.2d 1021 (2d Cir. 1991)	29
Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002)	28
Tomka v. Seiler Corp., 66 F.3D 1295 (2d Cir. 1995)	2, 8, 9, 15, 16, 17, 18
Tyson v. CIGNA Corp., 918 F. Supp. 836 (D.N.J. 1996)	17
United Carolina Bank v. Board of Regents, 665 F.2d 553 (5th Cir. Unit A 1982)), *cert. denied*, 488 U.S. 849 (1988)	20
United States v. Lee, 106 U.S. 196, 220 (1882)	14
United States v. Moten, 564 F.2d 620, 630 (2d Cir.), *cert. denied*, 434 U.S. 959 (1977)	26
United States v. Walsh, 700 F.2d 846, 858 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983)	26
United Steelworkers of America v. Weber, 443 *U.S.* 193 (1979)	23
Vakharia v. Swedish Covenant Hosp., 824 F. Supp. 769 (N.D. Ill. 1993)	17
Vanlaarhoven v. Newman, 564 F. Supp. 145 (D.R.I. 1983)	20
Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873 (D.C. 1998)	17
Wyss v. Gen. Dynamics Corp., 24 F. Supp. 2d 202 (D.R.I. 1998)	17

UNITED STATES CONSTITUTION

11th Amendment	11, 18
14th Amendment	11, 18

TABLE OF AUTHORITIES continued

STATUTES AND RULES	PAGE
28 U.S.C. § 1291	4
28 U.S.C. § 1331	5, 19
28 U.S.C. § 1332	5, 19
28 U.S.C. § 1367	19
28 U.S.C. § 1983	2, 7, 12, 13, 14
28 U.S.C. 1254(1)	3
42 U.S.C. § 1343	5
42 U.S.C. § 1983	5
42 U.S.C. § 2000e	15
42 U.S.C. § 2000e, et seq	4
42 U.S.C. § 2000e-2(a)(1)	16, 23
42 U.S.C. § 2000e–2(m)	23
N.Y. Educ. Law § 6201(1)	19
N.Y. Educ. Law § 6201(2)	19
N.Y. Educ. Law § 6204(1)	19
N.Y. Educ. Law § 6205	20
New York Human Rights Law	16
ACCNY §8-103	14
ACCNY §8-105(4)(a)(ii)	15
ACCNY §8-117	15
ACCNY §8-119	15
Fed. R. Civ. P., Rule 8(a)(2)	28
Fed. R. Civ. P., Rule 15(a)	28
Fed. R. Civ. P., Rule 10(c)	25, 27
Fed. R. Civ. P. Rule 56(e)	29
Fed. R. Evid., Rule 803(6)a	29
Southern Dist. of N.Y. Local Rule 56.1	27, 28
ABA Canons of Professional Conduct, Canon 5	13

TABLE OF AUTHORITIES continued

OTHER **PAGE**

New York City Bar Assoc., Committee On Professional and Judicial Ethics, *Formal Opinion, 1987* 13

Bonfield, *An Institutional Analysis of Agencies Administering Fair Employment Practices Laws (Part II)*, 42 N.Y.U.L. Rev. (1967) 12

Forbes Magazine, "Justice in the Dark, Oct., 2000 30

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a Writ of Certiorari to review the Summary Order of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS AND ORDERS ENTERED BELOW

An unpublished Summary Order of the Second Circuit Court of Appeals was decided on August 17, 2004, (App., 1a-7a) in which the court held that "all of [petitioner's] arguments on appeal are without merit. We, however, discuss in brief some of her contentions." (App., 3a).

Because of the Circuit Court's brevity and the fact that Petitioner filed her initial complaint on October 1, 1988, her appeal to the circuit court encompassed 16 years of protracted litigation, including determinations by the New York City Commission on Human Rights (hereinafter referred to as "Commission") and the U.S. Equal Employment Opportunity Commission (hereinafter referred to as "EEOC"), as well as various orders and nine written decisions by the Southern District Court of New York, all of which are cited below and included in the appendix.

On January 24, 1993,the Commission issued their "Determination and Order after Investigation" (App., 169a-182a) which was at odds with its investigation report submitted on July 24, 1991 (App., 236a-246a). Although the investigation culminated in a finding of "probable cause" for settling or litigating Petitioner's claims of discrimination and retaliation, the Commission's determination held that there was "no probable cause."

On October 19, 1993, in lieu of orders, the EEOC executed "right to sue in federal court" letters, (App., 163a-168a), wherein the EEOC accorded substantial weight to the Commission's findings.

On January 18, 1994, Petitioner timely filed in federal District Court. On May 24, 1995, the District Court dismissed

defendants who were agents of the City University of New York (herein after referred to as "CUNY") and held Petitioner's §1983 claims time barred. *Sank v. City Univ. of N.Y*, 1995 U.S. Dist. LEXIS 7021, 1995 WL 314696 (S.D.N.Y. 1995); (App., 147a-162a).

On November 10, 1995, in an order handwritten on the Commission's Notice of Motion, the District Court dismissed the Commission and the individual Commission defendants on grounds of immunity. (App., 145a-146a).

On February 13, 1997, the District Court denied Petitioner's request for reconsideration of leave to file interlocutory appeals on the May 24, 1994 and November 10, 1995 orders by characterizing them as interlocutory orders, rather than final judgments. *Sank v. City Univ. of N.Y*, 1997 U.S. Dist. LEXIS 1468, 1997 WL 65910 (S.D.N.Y. 1997). (App., 141a-144a).

On June 26, 1997, on motion, the District Court dismissed the remaining individual CUNY defendants from the action, citing as authority, *Tomka v. Seiler Corp.*, 66 F.3D 1295, 1313-16 (2d Cir. 1995). *Sank v. City Univ. of N.Y*, U.S. Dist. LEXIS 9045 (S.D.N.Y. 1997). (App., 134a-138a).

On April 5, 2002, the District Court granted the defendants' motion to dismiss CUNY's FOIL officer and their motion to strike the jury, as well as dismissing Sank's state claims. *Sank v. City Univ. of N.Y*, 94 Civ. 0253 LEXIS 5928 (S.D.N.Y. 2002). (App., 111a-132a).

On April 12, 2002, the District Court ordered the defendants to produce discovery within 30 days or file an affidavit that they did not have the information or could not reasonably locate it. *Sank v. City Univ. of N.Y*, 94 Civ. 0253 LEXIS 6253 (S.D.N.Y. 2002). (App., 106a-110a).

On August 2, 2002, the District Court denied the defendants' motion to dismiss Sank's remaining claims but granted dismissal of a retaliation claim involving threats to take Petitioner's research computer. *Sank v. City Univ. of N.Y*, 219 F. Supp. 2d 497 LEXIS 14034 (S.D.N.Y. 2002). (App., 80a-91a).

On August 2, 2002, the District Court issued a second Opinion that 1) decreed a bench trial for her pre-1991 Title VII claims, and 2) denied reconsideration of the Order April 12, 2002 order which denied additional time for discovery. This Opinion did, however, modify the April 5, 2002 Opinion by restoring Appellant's right to a jury trial and damages on any retaliatory actions occurring after November 21, 1991. *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 14032 (S.D.N.Y. 2002). (App., 92a-105a).

On September 30, 2002, the bench trial culminating in an Oral Opinion on October 1, 2002 in which the Court found for the Defendants. (App., 66a-79a). During the trial, the District Court initiated an *ex parte* conference (App., 231a-232a)., with the defendants' attorney, inviting them to file a summary judgment for petitioner's remaining claims.

On April 4, 2003, the Court granted the defendants' motion for summary judgment, dismissing all post-1991 retaliation claims by "treating" Petitioner's opposition memorandum as a motion to amend. *Sank v. City Univ. of N.Y*, No. 94 Civ. 0253 (RWS), LEXIS 5471 (S.D.N.Y. 2003). (App., 34a-62a).

On June 19, 2003, upon reargument, the District Court affirmed the April 4, 2003 order and October 7, 2002 Oral Opinion. *Sank v. City Univ. of N.Y*, No. 94 Civ. 0253 (RWS, LEXIS 10396 (S.D.N.Y. 2003), (App., 8a-31a), at which point Petitioner appealed to the 2nd Circuit Court of Appeals.

On August 17, 2004, the Second Circuit affirmed the lower court rulings, paving the way for this Petition. *Sank v. City Univ. of N.Y.*, 03-7677-cv (L), 03-7678-cv (CON), LEXIS 17245 (2nd Cir. 8/17/2004). (App., 1a-7a).

JURISDICTIONAL STATEMENT

The court of appeals entered its judgment on August 17, 2004 (App., 1a-7a) and this Petition was filed within 90 days pursuant to Supreme Court Rules. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND LESSER LAWS AND RULES INVOLVED

The relevant U.S. Constitutional and statutory provisions, as well as relevant rules and regulations involved, are set forth at App., infra, 183a-231a, including

U.S. Constitution, Amendment I (App., 183a)
U.S. Constitution, Amendment IV (App., 183a)
U.S. Constitution, Amendment V (App., 183a)
U.S. Constitution, Amendment XI (App., 183a)
U.S. Constitution, Amendment XIV, § 1 and 5 (App., 184a)
28 U.S.C. § 1254(1) Supreme Court Jurisdiction (App., 184a)
28 U.S.C. § 1291 Court of Appeals Jurisdiction (App., 184a)
28 U.S.C. § 1331 Federal Question(App., 185a)
28 U.S.C. § 1332 Diversity (App., 185a)
28 U.S.C. § 1367 Supplemental (App., 186a)
42 U.S.C. § 1983 Civil Rights (App., 188a)
42 U.S.C. § 2000e et seq. (App., 188a-192a)
Fed. R. Civil P., Rules 8, 10, 26, 37, and 56 (App., 192a-208a)
Fed R. Evid., Rules 701-703 (App., 208a-209a)
Fed. R. Appellate Proc., Rule 47(a)(2) (App., 209a)
Southern District Court Local Rule 56.1 and 56.2 (App., 209a-211a)
N.Y. Educ. Law § 6201, § 6204, and § 6205 (App., 212a-213a)
Administrative Code of the City of N.Y., Human Rights Laws (App., 213a-218a)
The Bylaws of the City Univ. of N.Y. (App., 226a-231a)

STATEMENT OF THE CASE

The Second Circuit Court of Appeals had jurisdiction to render a summary order pursuant to 28 U.S.C. § 1291 which disposed of all the issues raised by the decisions rendered by the Southern District Court of New York.

The Southern District Court of New York had jurisdiction to render decisions on Petitioner's Title VII, state contract, and U.S. Constitutional claims pursuant to 42 U.S.C. § 2000e, *et seq*, Civil Rights Act of 1964, and as amended in

1991, 42 *U.S.C.* § 1983, 42 U.S.C. § 1331, 42 *U.S.C.* § 1332, and 42 *U.S.C.* § 1343.

Petitioner is a Professor of Anthropology at CCNY. At all relevant times, she was a resident of New Jersey. She was instrumental in the creation of the Department of Anthropology (hereinafter referred to as the "Department") and was elected as its first Chairperson, serving in that capacity from 1969 through 1971.

From 1971 through 1987 she immersed herself in teaching, research, writing, and the creation of a Museum of Anthropology at CCNY. For 21 years Sank pursued her research with her own personal funds and equipment, as well as utilizing grant monies she received for her various research projects. In addition to an office and classrooms, CCNY provided Sank with an 800 square feet room to house her research laboratory, museum, and a computer which was hardwired and contained unique software relevant for her ongoing research projects.

During her initial stewardship as Chairwoman, the Department grew from five professors to 22. Student enrollment grew from zero to 1,500 students. The numbers majoring in Anthropology grew from 15 to 120. In 1987 when she was again elected Chairwoman, the enrollment had dropped to 200 students and only six professors remained. Within four months of resuming as Chair of the Department, student majors again climbed from 15 to 40, and enrollment jumped to 350 students -- a 34 percent increase over the previous year!

Her election as Chairperson came at a time of growing concern about the future of the Department. The Department faculty discussions often centered on the new Core Curriculum imposed by the Administration which required the faculty to teach novel courses outside their fields, despite their heavy seven course teaching load and it decentralized their traditional methodologies of teaching Anthropology.

The faculty became more unsettled when they became aware that the Department was being scrutinized by the administration inasmuch as the CCNY President, Bernard W.

Harleston (hereinafter referred to as "Harleston"), commissioned a two person Outside Review Committee (hereinafter referred to as "ORC"), to evaluate the Department and to make recommendations for change. Following a two day visit, the ORC issued a report on January 13, 1988, wherein the ORC reached the conclusion that the Department was unable to govern itself and recommended, *inter alia*, that the Department be put in "semi-receivership," Sank be removed as Chairwoman, and a person from outside the Department appointed in her stead. It also recommended three candidates for the position of Acting Department Chair, including Delmos Jones, a Black male, and two white females.

On February 29, 1988, Harleston called the entire Anthropology Department into his office, informing them that he was considering appointing Delmos Jones as Acting Chair, and by inference, removing Sank. On March 31, 1988, he called a special meeting of the Faculty Council and the Faculty Senate executive committee and told them he was removing Sank as Chairman. On April 27, 1988, Sank received Harleston's formal letter confirming her removal and Jones' appointment. Harleston justified her removal by stating that he was "acting on the advice" given by members of the Department, and cited Section 9.1c of the *Bylaws of The City University of New York*" as his authority. (App., 228). During the bench trial held sixteen years later, the District Court found that Harleston's actions were also justified as part of Harleston's personal affirmative action plan which favored the hiring of Black males. (App., 68a-69a).

Following the receipt of Harleston's letter (App., 246a). and before the CUNY Board of Trustees acted upon her removal and appointment of Dr. Jones, Sank sought access to the Board of Trustees' forum – but the By-Laws were designed to prevent access or contain notice provisions. (App. 226a).

Unable to obtain redress, Petitioner filed dual complaints with the New York City Commission on Human Rights and the EEOC. The Commission assigned attorneys to handle her case. Following an intensive investigation, the Commission

investigator found "probable cause" and "credibility issues that [could] only be resolved in a law enforcement bureau initiated settlement or public hearing." (App., 246a). Petitioner was then told by Commission attorneys that unless she went to mediation, the determination would be changed to "no probable cause." Eighteen months later the Commission issued a Determination which was at odds with the investigator's findings (App., 169-182), and on October 19, 1993, the EEOC issued Petitioner right to sue in federal court letters. (App., 163-168).

It should be noted by this Court that from the time Petitioner amended her Commission complaint to add a claim of racial discrimination, she was plagued by continuous acts of retaliation by Harleston's administration which used every academic administrative process at their command to make Petitioner's professional life as untenable as administratively possible -- given the extreme difficulty of firing a tenured full professor with a 20 year service record as a respected Anthropologist.

The injurious acts clearly presented a continuous pattern of retaliation. Each time Sank made an administrative request, she was denied. Every time the administration could take a privilege away, they took. Without notice, the administration seized Sank's research lab, computer, and her personal collection of Anthropology Museum artifacts. The administration refused to grant sabbatical leaves and assignments to academic advising. Harleston publicly embarrassed Sank in the *New York Times* and to her colleagues in the Faculty Council and Senate. Attempts were made to file false reports in her personnel files -- but failed because she had evidentiary documents proving their falsehood). The list goes on . . . almost *infinitum.*

Petitioner filed her federal complaint, *pro se*, on January 18, 1994 and an amended complaint was filed on May 27, 1994. On May 24, 1995, the District Court dismissed defendants who were agents of the City University of New York (herein after referred to as "CUNY") and held Petitioner's 28 U.S.C. § 1983 claims were time barred by a

three year statute of limitations, citing *Owens v. Okure*, 488 U.S. 235, 102 (1988); *Sank v. City Univ. of N.Y*, 94 Civ. 0253 (RWS), LEXIS 7021 (S.D.N.Y. 1995); (App., 147a-162a). Thus, began the District Court's process of "whittling" away Petitioner's claims and defendants over the next eight years of litigation.

It is clearly manifest that the strategy of the court, was to strip Sank of individual defendants and multiple claims of retaliation, leaving only CUNY as the sole remaining defendant.

On November 10, 1995, the District Court handwrote on the Commission Defendants' notice of motion, their dismissal from the federal action. (App., 145a-146a). On February 13, 1997, the District Court, clarified that "By Decision and Order dated November 10, 1995, the Court dismissed Sank's claims against defendants the New York City Commission on Human Rights (the "Commission"), Dennis de Leon, Stephanie Orteleiva, Lizbeth Schalet and Rudolph Will (collectively, the "Commission Defendants") on *qualified immunity* grounds." (emphasis added), (App., 142a), *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 1468 (S.D.N.Y. 2/13/1997). Upon reargument the District Court reaffirmed the order and denied Sank's request for immediate appeal, stating that such appeals were granted "only to final judgment[s]' and not to interlocutory orders," ignoring *Scheuer v. Rhones*, 416 U.S. 232 (1974). (App., 139-140). The District Court also denied Petitioner request for leave to file an immediate appeal on this decision. (App., 139a-140a). The 2nd Circuit Court upheld the decision on the ground of *absolute* immunity but did not address Appellee Sank's argument that the Commission's rules were unconstitutional as applied and the District Court's denial of an interlocutory appeal denied her a fair hearing. (App., 4), *Sank v. City Univ. of N.Y.*, 03-7677-cv (L), 03-7678-cv (CON), LEXIS 17245 (2nd Cir. 8/17/2004).

Next, the District Court stripped Petitioner of the remaining individual CUNY defendants, citing *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313-1316 (2d Cir. 1995) for the premise that "individual defendants, even those with

supervisory capacity, could not be held personally liable for alleged violations of Title VII." (App., 137), *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 9045 (S.D.N.Y. 6/26/1997) and again denied Sank leave to file an interlocutory appeal. (App., 133). The instant 2nd Circuit again affirmed the District Court decision, citing a case which followed *Tomka*. (App.,4) and did not address the denial of Sank's subsequent request to file an interlocutory appeal, or the federai questions expressly raised.

On April 5, 2002, the District Court dismissed Sank's state contract claim against CUNY. Sank claimed that the individual Defendants and the institutional Defendant CUNY had unconstitutionally (without notice or forum) deprived her of a valuable property right (the chair of her Department) which was covered by the terms of her Union Contract. (App., 129), *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 5928 (S.D.N.Y. 4/5/2002). The District Court held that CUNY's senior colleges were "arms of the State" entitled to Eleventh Amendment immunity and that federal courts lacked jurisdiction to hear breach of contract claim against state entities, including CUNY because the New York Court of Claims had exclusive jurisdiction over such claims, thus ignoring *Regents of the University of California v. John Doe*, 519 *U.S.* 425 (1997) which held that whether a particular agency was an arm of the state was a federal (not state) question, and a matter of federal (not state) law. The instant Court of Appeals agreed with the dismissal of this claim based on CUNY's "arm of the state" status (App., 4).

On April 15, 2002, Defendants sought summary judgment dismissal on all of Sank's claims. Sank countered with evidence that she had not yet received the discovery ordered by the Court Order dated April, 5. The Court ordered the Defendants to produce discovery or a sworn affidavit of compliance and delayed the summary judgment hearing for another 30 days after compliance. (App., 106a-110a), *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 6253 (S.D.N.Y. 4/15/2002).

On August 2, 2002, the District Court denied Defendants summary judgment and dismissal of Sank's retaliation claims (except for a retrenchment claim) and pointed out that the Defendants had not even properly challenged certain claims and restored Sank's right to a jury trial on those claims occurring after Nov. 1991 when Title VII was amended to allow damages and jury trials. (App., 92a-105a), *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 14032 (S.D.N.Y. 8/2/2002). On the same day, the District Court issued a second opinion, ruling that (App., 80a-91a), the Defendants' summary judgment motion was denied except as to Sank's Title VII retaliation claim based on the threats to take away her research computer which was dismissed (App., 80-91), *Sank v. City Univ. of N.Y.*, 219 F. Supp. 2d 497 LEXIS 14034 (S.D.N.Y. 8/2/2002).

On October 7, 2002, the District Court issued an oral decision following a *pro se* six day bench trial on all pre-1991 Title VII claims but refused to hear Sank's Constitutional claims. On the morning of the trial's second day, the judge held an ex parte conference with the defendant's attorney, inviting him to again bring a third summary judgment motion on Sank's remaining claims. The decision acknowledged that Sank's removal as chair was based, in part on the President's personal affirmative action plan of hiring Black males but ruled for the defendants, including the three retaliation claims. (App., 80-81).

On April 4, 2003, the District Court dismissed Sank's remaining claims on motion for summary judgment (App., 34-65), *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), 5471 (S.D.N.Y. 4/4/2003) and issued a Final Judgment on April 8, 2003. (App. 32-33). On June 19, 2003, the Court heard and denied Sank's motion to amend the factual findings and conclusions of law of the oral decision of October 7, 2002 and her motion for reconsideration of the April 4. 2003 order. (App., 8a-31a), *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 10396 (S.D.N.Y. 6/19/2003), thus leading to her appeal to the Second Circuit Court of Appeals and this Petition

REASONS FOR GRANTING PETITION

The issues presented herein were thoroughly presented to Second Circuit Court of Appeals

I. THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO SETTLE AN IMPORTANT FEDERAL QUESTION WHICH THREATENS THE INTEGRITY AND UNDERMINES PUBLIC CONFIDENCE IN HUMAN RIGHTS LAW: WHETHER THE COMMISSION, ITS COMMISSIONER AND STAFF ATTORNEYS HAVE ABSOLUTE IMMUNITY FOR THEIR INVESTIGATORY AND ADMINISTRATIVE ACTIONS WHICH KNOWINGLY VIOLATE A COMPLAINANT'S CONSTITUTION RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

In the instant case and in previous cases, the Second Circuit Court of Appeals decided an important question of federal law that has not been, but should be, settled by this Court. To date, this question has successfully evaded this Court's review.

The District Court held that the Commission (a municipal agency) and its attorneys had *qualified immunity* and were immune from suit, then denied Petitioner leave to file an interlocutory appeal despite the ruling of this Court in *Behrens v. Pelletier*, 516 U.S. 299 (1996), which held that an interlocutory order dismissing defendants on grounds of qualified immunity is "an immediately appealable 'final decision,'" citing *Mitchell v. Forsyth*, 472 U. S. 511, 530 (1985).

The 2nd Circuit Court affirmed the District Court dismissal but contradicted the opinion, holding that the Commission's staff attorneys who were acting completely within their prosecutorial capacity had *absolute immunity* from suit, citing *Rudow v. City of N.Y.*, 822 F.2d 324, 327-28 (2d Cir. 1987).[1] Without addressing the two other inherent issues, by inference, the 2nd Circuit also affirmed the District's

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[1] It should be noted that in this case the 2nd Circuit Court recognized the conflict of interest the Commission attorneys faced when dually representing the Commission and a complainant.

Court's dismissal of the Commission and the denial of Petitioner immediate interlocutory appeal.

The importance of settling this issue is that each year thousands of New York city complainants like the Petitioner herein, rely on the integrity and fair treatment of the human rights agencies to litigate or settle their complaints of employer discrimination -- as do tens of thousands complainants across the country. For an example of the number involved: in 2002, the Commission reported "a backlog of nearly 5,000 cases, some dating back as far as 20 years."[2] By the end of 2002, the Commission proudly reported that they had fast-tracked 3,500 cases, finding probable cause to litigate only 1% of these cases.[3] Not surprisingly, the Commission determined that 49% lacked probable cause to litigate or settle.[4] Out of the remaining 50%, only 6% were settled. 44% were subjected to "administrative closure."[5]

Petitioner submits that if the Commission and its attorneys are not held accountable for their Constitutional violations, they will avoid the legislative intent of Title VII and 42 U.S.C § 1983 and they will continue to trample the rights of their unwitting clients who can not afford private attorneys to protect their civil rights in state or federal courts.

In the instant case, the Petitioner first knew that the Commission attorneys were mishandling her case when they threatened to change their investigator's finding of "probable cause" to "no probable cause" if she didn't mediate or settle – and when she refused, that is exactly what they did after 18 months of stonewalling. In toll, the Commission cost Petitioner five years of emotional distress, irreparable harm to

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[2] New York City Commission on Human Rights website, *2002 Annual Report*, p. 2 at http://home.nyc.gov/html/cchr/pdf/annual.pdf.

[3] Bonfield, *An Institutional Analysis of Agencies Administering Fair Employment Practices Laws (Part II)*, 42 N. Y. U. L. Rev. 1035, 1048-1049 (1967). "[The] vagueness of the probable cause concept makes it a flexible tool in the hands of a commissioner."

[4] *2002 Annual Report, supra.*

[5] *Supra.*

her case as it grew stale and, in all probability, their egregious actions encouraged CUNY defendants to continue the onerous campaign of retaliation in hopes that she would drop her suit.

Petitioner's federal complaint never challenged the Commission's right to decide whether or not to litigate her case. Her claim was based upon the Commission attorneys' failure to use independent judgment when fulfilling their administrative and discretionary functions, or make full disclosure of their conflicts of interests, dual representation,[6] and identity of interest with the city and its sister agencies including CUNY/CCNY, or to disclose that that they were following their own set of rules and procedures for enforcing Title VII rights – not federal rules.

In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), this Court held that local governments and its agencies were not absolutely immune from 42 U. S. C. § 1983 suits.

Petitioner submits that the Commission and its attorneys were not functioning as advocates or prosecutors when they denied her due process and equal protection. *Mitchell v. Forsyth*, 472 *U.S.* 511, 105 S. Ct. 2806 (1985) held that 1) even the U. S. Attorney General does not have absolute immunity, but 2) he does have qualified immunity for his *prosecutorial* actions. The *Mitchell* Court applied the *Harlow* function test to determine whether the Attorney General should be accorded qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982

In *Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993) this Court recognized the distinction between a criminal prosecutor's preparation for the judicial phase of a criminal process (which was accorded absolute immunity) and an attorney's acts of investigation and administration. which

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[6] See New York City Bar Assoc., Committee On Professional and Judicial Ethics, *Formal Opinion, 1987-3* at App., 220a, which indicates that the Commission attorneys were aware of the conflict of interest in dual representation. See also *Canon 5 of the ABA Canons of Professional Conduct* which state "A Lawyer should exercise independent professional judgment on behalf of a client. (App., 218).

were not immune if they violated a client's Constitutional rights. In the instant case, the Commission attorneys were not criminal prosecutors. They were civil attorneys. The were trying to make the Petitioner mediate or settle, not preparing for litigation. At this point they were not involved in the investigation which was done by a bureau specialist who was a paid investigator.

In *Butz et al. v. Economou et al.,* 438 U.S. 478, 98 S. Ct. 2894 (1978), the Court expressly ruled an official would be held liable in damages under § 1983 if the constitutional right he was alleged to have violated was "clearly established" at the time of the violation.(even when authorized to act under a federal or state statute. Furthermore, an unconstitutional act, even if authorized by statute, is viewed as not authorized and there can be no immunity defense. The *Butz* Court paid tribute to the 1882 Supreme Court justices who held that "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *United States v. Lee*, 106 U.S. 196, 220, 229 (1882).

When she drafted her federal complaint, Petitioner added a § 1983 claim against the Commission and its staff attorneys -- but only after months of painstaking *pro se* research, did she finally find out why the Commission attorneys torpedoed her case. She found out that her attorneys were not just her attorneys, but they in fact, dually representing their agency. She also found out that the Commission and her adversary, CUNY, were both city agencies. Both agencies were beholding to the city for financial support and answered to the mayor. She also confirmed that the attorneys were not prosecutors but attorneys who statistically rarely tried civil complaints.

She discovered the numerous Commission rules that had deprived her of due process and a fair hearing on her complaint against the CUNY/CCNY. Title 8 of the *Administration Code of the City of New York* ("*ACCNY*") contains the rules which govern the Commission. *ACCNY* §8-

103 empowers the mayor to make political appointments of all 15 commissioners. (App., 215a). *ACCNY* §8-117 creates conflicts of interest, dual representation, and destroys the attorney-client privilege by providing that "the commission, by its prosecutorial bureau, shall be a party to all complaints," and gives the Commission the power to make its own substantive and procedural rules without oversight. (App., 216a). The Commission is not bound by rules of evidence. *ACCNY* §8-119. (App., 217a). *ACCNY* §8-105(4)(a)(ii) states that "with respect to discrimination alleged to be committed by city officials or city agencies, such investigation shall be commenced *after consultation with the mayor*," thus creating divided loyalties and destroying attorney-client privilege. (emphasis added) (App., 215a). In short, the Commission rules assure biased and unequal treatment of claimants who bring actions against the city and its agencies (including CUNY/CCNY) who all share an "identity of interest."[7] The Commission touts that it represents complainants in civil suits under Title VII – but it does not disclose, that in reality, it represents itself and its paymaster, the city of New York – and in the instant case, shared an legally incestuous relationship with the defendant CUNY.

II. THIS COURT SHOULD GRANT CERTIORARI TO SETTLE THE IMPORTANT FEDERAL QUESTION OF WHETHER THE CLEARLY EXPRESSED LANGUAGE OF 42 U.S.C. § 2000e SUBJECTS EMPLOYER'S AGENTS TO INDIVIUAL LIABIITY FOR THEIR DISCRIMINATORY ACTS.

On June 26, 1997, the District Court dismissed the remaining individual defendants, leaving only the institutional defendant CUNY as a party. The court cited *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2dCir. 1995) as precedent. *Tomka* was the 2nd Circuit's seminal case which ruled that individuals with supervisory control over a plaintiff may not be held personally

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[7] See *Monell* at 658, 690, n. 55, which highlights that a New York City Department has "no greater separate identity from the city than did the Director of the Department when he was acting in his official capacity."

liable under Title VII but that individual liability was permitted under state anti-discrimination law, i.e., the New York Human Rights Law. (App., 134a-138a), *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 9045 (S.D.N.Y. 6/26/1997). The District Court also denied Petitioner's request to certify an interlocutory appeal on this issue on July 14, 1997. (App., 133a).

Despite the express language and clear meaning of Title VII, U.S.C. § 2000e-2(a)(1), the 2nd Circuit Court affirmed the lower court, stating that "under Title VII individual supervisors are not subject to liability," citing *Mandell v. County of Suffolk*, 316 F.3d 368, 377 (2d Cir. 2003), a case which followed *Tomka* but added no further analysis of this reoccurring, profligate issue. (App,. 4). *Sank v. City Univ. of N.Y.*, 03-7677-cv (L), 03-7678-cv (CON), LEXIS 17245 (2nd Cir. 8/17/2004).

Title VII makes it an "unlawful employment practice for an employer (1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." The act defines "employer" as a "person engaged in an industry affecting commerce who has fifteen or more employees . . . *and any agent of such a person.*" (emphasis added), 42 U.S.C. § 2000e-2(a)(1), (App., 188a).

Petitioner respectfully requests that this Court grant her petition for many compelling reasons. First and foremost, thousands of complainants rely in good faith on the manifest intentions articulated by its framers and this Court's reassurance that the purpose of Title VII was to fully compensate the victim and deter future discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417, 422 (1975).

Second: as long as this important federal question remains unsettled by this Court, this issue will continue to plague and drain the resources of municipal, state, and federal courts alike. Employer discrimination actions are one of the most ubiquitous forms of litigation in the entire United States.

Third: the instant 2nd Circuit's decision is in conflict with the decisions of other federal circuits – and the federal circuits are in conflict with their state courts.

At last count there were 51 Second Circuit cases alone that cited to *Tomka*! This figure does not include those that go unreported pursuant to the Circuit Court's orders. The number of state and local cases were too exhaustive to count. This issue will not go away!

The following circuits refuse to recognize individual liability: *Lissau v. S. Food Serv. Inc.*, 159 F.3d 177, 181 (4th Cir. 1998); *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 267 (5th Cir. 1999); *Hiller v. Brown*, 177 F.3d 542, 545-46 (6th Cir. 1999); *Gastineau v. Fleet Mortgage Corp.*, 137 F.3d 490, 494 (7th Cir. 1998); *Lenhardt v. Basic Inst. of Tech., Inc.*, 55 F.3d 377, 381 (8th Cir. 1995); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1189 (9th Cir. 1998); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993) *Gary v. Long*, 59 F.3d 1391, 1398 (D.C. Cir. 1995).

To the contra, many lower courts have held that individual liability is permitted under federal law. See, e.g., *Griffith v. Keystone Steel & Wire Co.*, 858 F. Supp. 802, 805-06 (C.D. Ill. 1994) (interpreting Title VII to permit individual liability); *Vakharia v. Swedish Covenant Hosp.*, 824 F. Supp. 769, 784-86 (N.D. Ill. 1993) (same); *Lamirande v. Resolution Trust Corp.*, 834 F. Supp. 526, 528-29 (D.N.H. 1993) (same).

In addition, the following federal district and state courts find individual liability under state employment discrimination laws: See, e.g., *Dici v. Pennsylvania*, 91 F.3d 542, 553 (3d Cir. 1996); *Comiskey v. Auto. Indus, Action Group*, 40 F. Supp. 2d 877, 891 (E.D. Mich. 1999); *Meara v. Bennett*, 27 F. Supp. 2d 288, 291 (D. Mass. 1998); *Wyss v. Gen. Dynamics Corp.*, 24 F. Supp. 2d 202, 210 (D.R.I. 1998); *Tyson v. CIGNA Corp.*, 918 F. Supp. 836 (D.N.J. 1996); *Broomfield v. Lundell*, 767 P.2d 697 (Ariz. Ct. App. 1988); *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 888 (D.C. 1998); *Genaro v. Cent. Transp., Inc.*, 703 N.E.2d 782, 785 (Ohio 1999); *Schram v. Alberton's, Inc.*, 934 P.2d 483, 488 (Or. Ct.

App. 1997); *Carr v. U.P.S.*, 955 S.W.2d 832, 838 (Tenn. 1997).

In conclusion, Petitioner would ask this court to consider the well reasoned *Tomka* dissent, where Judge Parker used this Court's precedents to support his opinion that "It is well-established that, without some clear indication that Congress intended otherwise, courts must not construe the language of a statute in a manner which renders a provision of that statue mere surplusage." *Tomka, supra* at 1319. Parker reasoned that "The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written," citing *Estate of Cowart v. Nicklos Drilling*, 112 S. Ct. 2589 (1992); *Tomka, supra.* Parker concluded that "Title VII permits an employer and that employer's agent to be held jointly and severally liable for Title VII violations. The language of the statute permits it, canons of statutory interpretation require it, and the object and overriding policy goals of Title VII warrant it." *Supra* at 1324.

III. THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO SETTLE THE IMPORTANT FEDERAL QUESTION OF WHAT FACTORS MUST BE CONSIDERED BEFORE COURTS ACCORD TO A UNIVERSITY 11TH AMENDMENT IMMUNITY AS AN "ARM OF THE STATE."

On April 5, 2002, the District Court dismissed Petitioner's state breach of contract claim, ruling that CUNY, its central administration, and its senior colleges were arms of the state entitled to Eleventh Amendment immunity because CUNY was funded and administered by the State to a great degree. (App., 128a-129a). The court further held that federal courts lacked jurisdiction to hear breach of contract claims against state entities inasmuch as the New York Court of Claims had exclusive jurisdiction over such claims. (App., 129a). *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 5928 (S.D.N.Y. 4/5/2002); (App., 111a-132a).

Upon appeal to the 2nd Circuit Court, Petitioner requested that the court consider this Court's reasoning in *Regents of the University of California v. Doe*, 519 U.S. 425

(1997) before rubberstamping the lower court's dismissal of her state contract claim. In the *Doe* case, this Court discussed the factors which should be considered before granting "arm of the state" immunity but ultimately decided the case on other grounds. Petitioner also argued in her complaint to the lower court, she had invoked federal question jurisdiction, 28 U.S.C. § 1331 (App., 185a); diversity jurisdiction, 28 U.S.C. § 1331 (App., 185a); and supplemental jurisdiction, 28 U.S.C. § 1367 (App., 186a). She also pointed out that federal courts always had jurisdiction on a "federal question" involving a Constitutional immunity question.

On August 18, 2004, the 2nd Circuit Court affirmed the lower court's decision, stating that "CUNY and its colleges are an 'arm of the state,' and both CUNY and CCNY are immune from Sank's breach of contract claims pursuant to the Eleventh Amendment," and citing as precedent *Clissuras v. City Univ. of N.Y.*, 359 F3d 79, 83 (2d Cir. 2004). (App., 4a). *Sank v. City Univ. of N.Y.*, 03-7677-cv (L), 03-7678-cv (CON), LEXIS 17245 (2nd Cir. 8/17/2004), (App., 1a-7a).

Petitioner would ask this Court to note that CUNY was created and developed by the city of New York, not the state. It is composed of senior colleges and community colleges. CUNY is a hybrid creature, not a corporation, but a creation of the city of New York and is funded by both the city and the State of New York.

NY CLS Educ §§ 6201(2) states "The legislature intends that the city university of New York should be maintained as an independent system of higher education governed by its own board of trustees responsible for the governance, maintenance and development of both senior and community college units of the city university." (App., 212a). *N.Y. Educ. Law* § 6204(1) provides that "The control of the educational work of the city university shall rest solely in the board of trustees which shall govern and administer all educational units of the city university. (App., 212a). In *NY CLS Educ* §§ 6201(1) the state legislators expressly articulated that although the state provides CUNY's operating expenses and debt service, CUNY governance "should preserve the city's

participation in the governance of the university created and developed at city expense." (App., 212a). *N.Y. Educ. Law* § 6205 provides that the state and city split the costs of indemnification: 1) the state will indemnify the board of trustees, as well as the teaching and supervising staff of the senior colleges, and 2) the city will indemnify the employees of community colleges for any federal or state court judgments. (App., 212a-213a).

Petitioner submits that there are several compelling reasons for granting certiorari. First, a very important federal question should be settled: whether CUNY is entitled to 11th Amendment "arm of the state" immunity. This issue affects almost every educational system across the country, and although repetitious, the "arm of the state" issue continues to evade review. The current state of the law in disarray -- and conflicts abound between the many Circuit Courts and the confusion reigns in state court decisions..

The 1st Circuit has yet to rule on point, but in *University of Rhode Island v. A. W. Chesterton Co.*, 2 F.3d 1200 (1st Cir. 08/16/1993), a district court denied the University of Rhode Island's remand motion without an evidentiary hearing, relying on an earlier district court decision, *Vanlaarhoven v. Newman*, 564 F. Supp. 145 (D.R.I. 1983) (Selya, J.), which determined that URI was *not* an "arm" of the State for sovereign immunity purposes.

In the 2nd Circuit, in both federal and state courts, there are too many cases to count which accord CUNY arm of the state status. The 3rd and 4th Circuits have yet to rule on this issue.

The 5th Circuit has held that Public universities may qualify for immunity as members of the state team, depending upon "their status under state law and their relationship to state government." *Lewis v. Midwestern State Univ.*, 837 F.2d 197, 198 (5th Cir.) (citing United *Carolina Bank v. Board of Regents*, 665 F.2d 553 (5th Cir. Unit A 1982)), *cert. denied*, 488 U.S. 849 (1988). In *Richardson v. Southern University*, 118 F.3d 450 (5th Cir. 08/04/1997), the court held that Southern University was an arm of the state.

In Tennessee, the 6th Circuit granted "arm of the state" immunity in to a county Board of Education! See *Lillard v. Shelby County Board of Education*, No. 94-5694 (6th Cir. 02/21/1996). Under Ohio law, Kent State University was ruled an "arm of the state" in *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 302-07 (6th Cir. 1984).

The 7th Circuit placed heavy reliance on Purdue's financial dependence on the state in determining that Purdue was an arm of the state. *Kashani v. Purdue Univ.*, 813 F.2d 843, 848 (7th Cir. 1987).

In the 8th Circuit a technical college was granted "arm of the state status," *Hadley v. North Arkansas Community Technical College*, No. 94-3703 (8th Cir. 02/14/1996).

The 9th Circuit held that the University was *not* an arm of the state, *Doe v. Lawrence Livermore National Laboratory*, 65 F.3d 771 (9th Cir. 09/11/1995), giving rise to this Court's decision in *Regents of U. of Calif v. Doe, supra.*

The 10th Circuit is all over the playing field. In *Brennan v. University of Kansas*, 451 F.2d 1287 (10th Cir. 1971), the university was given 11th Amendment immunity. This encouraged the New Mexico court to hold that school boards in New Mexico were arms of the state. See *Martinez v. Board of Educ.*, 748 F.2d 1393, 1396 (10th Cir. 1984) which was followed in published and unpublished decisions. See, e.g., *Gonzales v. Mountainaire Pub. Schs.*, No. 93-2297, 1994 WL 599514 (10th Cir. Oct. 31, 1994); *Garcia v. Board of Educ.*, 777 F.2d 1403, 1407 (10th Cir. 1985); *Maestas v. Board of Educ.*, 749 F.2d 591, 592 (10th Cir. 1984). Then in *Sharlene K. Watson, v. University of Utah Medic*, 75 F.3D 569, 106 Ed. Law Rep. 1030 (10th Cir. 01/19/1996) the court ruled that the University of Utah was an arm of the state.

As for the 11th and D.C. Circuits, they have yet to rule on the "arm of the state" issue.

In conclusion, Petitioner submits that unless this Court intervenes, the trend would indicate that all educational institutions will soon become judgment proof. In the interim, the law remains in a state of chaos and the man in the street is

unable to ascertain the rule of law – leading to needless litigation and a waste of judicial resources.

IV. THIS COURT SHOULD GRANT CERTIORARI TO SETTLE IMPORTANT FEDERAL TITLE VII QUESTIONS AS TO WHETHER 42 U.S.C. § 2000E–2(M) APPLIES TO CASES WHERE A DEFENDANT ADVANCES DISCRIMINATORY AND NON-DISCRIMINATORY REASONS FOR HIS OR HER DISCRIMINATORY ACT, AND IN ADDITION, WHETHER THE LEGITIMACY OF THE REASONS, PURSUANT TO *MCDONNELL DOUGLAS CORP. V. GREEN*, BE A FACTOR.

In addition to several summary judgments, Petitioner's claims were subject to bifurcated trials inasmuch as her claims arose before and after the November, 1991 amendments of Title VII which provided for damages and a jury trial.

At the end of the bench, the factfinder found for defendant CUNY on 1) the seminal claim of discrimination wherein President Harleston removed Sank as Chair of her Anthropology Department; 2) a claim based on retaliatory taking of Sank's laboratory and Anthropology Museum without notice and 3) retaliation claims of repeated denials of sabbaticals over a three year period.[8]

The Court orchestrated the bench trial to accommodate the three-step burden-shifting paradigm set forth in *McDonnell Douglas Corp. v. Green*, 411 *U.S.* 792, 802-03 (1973) which in the final analysis became a credibility contest of adversaries advancing mixed motives for the CUNY administration's facially discriminatory acts. Defendants testified to various non-discriminatory reasons that President Harleston removed Dr. Sank (a white older female) as chair and simultaneously replaced her with Dr. Delmos Jones (a young Black male). Sank presented evidence that their reasons were pretextual and that the real reason was a discriminatory violation of Title VII,

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[8] It should be noted by this Court, that Petitioner respectfully requests that she be allowed to fully brief the dismissal of the various retaliation claims which were not addressed in this writ due to page limitations.

i.e., that Sank was removed to advance Harleston's personal affirmative action plan of aggressively hiring Black males for prominent positions.

At the conclusion of the trial, the judge issued his oral opinion which followed the burden-shifting paradigm built from 30 years of *McDonnell-Burdine* rulings. The Court ruled that the non-discriminatory reasons given for Sank's removal proved that the defendant had not violated Title VII.

42 U.S.C. § 2000e–2(a)(1) states "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e–2(m) provides that ". . . an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." See *Palace, Inc. v. Costa*, 123 *S. Ct.* 2148 (2003)[9] and also *Johnson v. Transportation Agency,* 480 U.S. 616 (1987) (emphasis added) where the Supreme Court held that an affirmative action plan must be gender-racially neutral; it can not discriminate against a particular race or gender, *and it can not be used to discharge white employees in order to replace them with black hirees.* See also *United Steelworkers of America v. Weber*, 443 *U.S.* 193, 199 (1979); *McDonald v. Santa Fe Trail Transp. Co.*, 427 *U.S.* 273 (1976); and *Griggs v. Duke Power Co.*, 401 *U.S.* 424, 431 (1971).

In Desert Palace, Inc. v. Costa, 123 S.Ct. 2148 **(2003)**, this Court instructed lower courts, *inter alia* that 42 U.S.C. § 2000e–2(m) means exactly what it says – that when a defendant articulates more than one reason for the facially discriminatory act, and one reason demonstrates

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[9] Before the District Court issued an Amended Judgment, Appellant argued *Costa* as precedent.

discriminatory animus, although the other reasons are non-discriminatory, the plaintiff has made his or her case.

In the oral opinion, the District Court applauded Harleston's personal affirmative plan and refused to recognize it as an impermissible discriminatory reason for removing Sank and simultaneously replacing her with a Black male – trading, in essence, a highly qualified older white female chair for a young Black male who had never chaired a department. The Court commented on Harleston's "course of conduct" that demonstrated that "on a number of occasions, whites and sometimes females were replaced by the administration by black males," and noted that "it is clear that Harleston believes it is entirely appropriate," as was his membership in Sigma Pi Phi, an organization composed of black males that was devoted to the advancement of its members. (App. 69). The Court also mentioned that Sank's statistical data indicated Harleston's course of conduct included a preference for hiring Black males. The Court ruled, however, that "the course of conduct reflected efforts by President Harleston to achieve affirmative action in the university," was not pretext. (App. 69). The Court ignored the fact that CUNY's Affirmative Action Plan called for an aggressive campaign for *recruiting females* and minorities, rather than *hiring Black males*.

In reaching a decision, the District Court ignored the an important factor in the test laid down in *McDonnall*, which is used for testing claims of Title VII discrimination, that when the burden shifts to the defendant, the non-discriminate reasons for the act must be "legitimate." *McDonnell, supra* at 804. In the instant case, the Petitioner advanced the argument that all of the reasons relied upon by the defendants involved breaking the CUNY Bylaws.

It should be also be noted that in the 2nd Circuit, the precepts of *McDonnall* are selectively applied, e.g., with regard to reason given, there is no burden of persuasion, only a burden of production. They dispense with the requirement that a proferred "non-discriminatory" reason be "legitimate" " and "must be legally sufficient to justify a judgment for the

defendant." The Courts still use the Price-Waterhouse mixed motives analysis and test. of *Morris v. N.Y. City Dept. of Sanitation*, 2003 U.S. Dist. LEXIS 5146; 91 Fair Empl. Prac. Cas. (BNA) 942 (S.D.N.Y 2003), citing to Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

V. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE STANDARD OF REVIEW FOR SUMMARY JUDGMENT AS DISTINQUISHED FROM A HEIGHTENED STANDARD, AND EVIDENTIARY STANDARD.

The 2nd Circuit held "Sank failed to make out a prima facie case that these acts were retaliatory employment actions or that defendants' explanation for these actions were pretextual," and "insofar as these claims were premised on retaliatory acts that were not alleged in the complaint, the district court did not abuse its discretion in refusing to permit Sank to amend her complaint to include these claims because these claims were raised late in litigation and not until eight to eleven years after they occurred." (App., 6).

Upon appeal, Petitioner pointed out that her opposition to summary judgment papers were not a motion to amend, but did contain a list of all the claims that she had plead to the District Court over a period of eight years.

Petitioner first raised post-1991 retaliatory claims in her original federal complaint, then again in her amended complaint. Since the defendants continued their practice and pattern of retaliation after she filed in federal court, she often included a current claims pursuant to Fed. R. Civ. P., *Rule* 10(c). (App. 192a). In 1996 she further documented her claims to date in a motion to reconsider, accompanied by a bound exhibit book which she presented to the Court and the defendants. The Court recognized these many claims in its decision of July 31, 2002,[10] finding that three retaliatory claims presented prima facie cases and footnoted in the

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[10] The District Court pointed out in its July 31, 2002 decision that Sank's allegations were not "new" facts, having been made part of the record beginning as early as 1996.

decision the fact that the defendants had not "challenged" the others so the Court would not address them in that decision. (App.,102a), *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 14032 (S.D.N.Y. 8/2/2002).

Over a year went by and still the defendants refused to challenge many post-1991 claims either by denials or giving a non-discriminatory reason for their retaliatory actions, despite the courts warning. On the second morning of bench trial, while Petitioner asked and was excused to prepare her rebuttal the Court called an *ex parte* conference with the defendant's attorney, inviting him to bring a third summary judgment motion to deal with the remaining post-1991 retaliation claims that were scheduled for the jury trial that would follow the bench trial. See ex parte transcript at App. 231a-232a.

The conference was extremely prejudicial, demonstrating judicial bias and lack of impartiality. It occurred before Sank called a single witness. It telegraphed the fact that the judge had already decided to find for the Defendants – and he was postponing the jury trial to give defendants a third shot at summary judgment. The fact that the judge would schedule such a conference served to surprise, rattle, intimidate, and demoralize the *pro se* Petitioner. In *United States v. Walsh*, 700 F.2d 846, 858 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983), the Second Circuit held that ex parte conferences "should not be conducted except in extraordinary circumstances," and that although ex parte conferences are improper and unnecessary, they do not rise to reversible error until they affect the fairness of the trial, citing *Walsh*, 700 F.2d at 858; and *United States v. Moten*, 564 F.2d 620, 630 (2d Cir.), *cert. denied*, 434 U.S. 959 (1977).

The 2nd Circuit Court ruled that the "ex parte discussion with defense counsel regarding a procedural matter, because no decisions were made during this discussion, and the court immediately informed Sank when she returned that the conversation occurred and a record of the conversation was available, we conclude that this discussion did not affect the fairness of the trial and therefore does not warrant a reversal,"

citing *Robinson v. Cattaraugus County,* 147 F.3d 153, 164-65 (2d Cir. 1998).

Petitioner disagree submits that instead of inviting a summary judgment, the District Court should have imposed sanctions on the Defendants for failure to plead and held for the Petitioner on the unchallenged claims, pursuant to the Federal Rules of Civil Procedure.

Summary Judgment and dismissal of all remaining claims

On motion, Defendants asked that the unchallenged claims be dismissed because Sank did not file a *Southern District Court Local Rule* 56.1 *Statement*, (App. 210a) despite the fact that such a filing was literally impossible, since Sank was never given their non-discriminatory reasons for there acts of retaliation.

The Defendants' points argued two retaliatory claims: 1) "Plaintiff has not demonstrated a causal connection between her Class Schedule in 1993 and her charge of discrimination with the NYCCHR," and 2) "Plaintiff has not demonstrated a causal connection between the Fall 2001 Schedule of classes and her charge of discrimination with the NYCCHR."

Sank argued that Defendants erred in their understanding of the rules regarding Title VII acts of retaliation; that she did not have to prove a relationship back to the initial act of discrimination plead in her NYCCHR/Commission complaint, but only to a protected act close in time to the retaliatory act in question. *Clark Co. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001). Furthermore, defendants were well aware of the unbroken temporal chain of protected activities, including multiple union complaints to the Faculty Senate, and the CCNY ombudsman, as well as amended complaints in federal courts, and claims admitted under Fed. R. Civ. P., *Rule* 10(c). (App. 192a).

Misapplications of the various Standards of Review

When the Defendants filed their third and final summary judgment motion, it was procedural flawed.

Although the Defendants brought a motion for summary judgment, they were actually pleading that Sank's original complaint failed to state causes of action for which relief could be granted. This is why the judge treated her opposition papers as a Rule 15(a) motion to amend. (App., 35). *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), 5471 (S.D.N.Y. 4/4/2003). It also gave the judge the opportunity to use more than one standard of review.

Petition submits that the District Court applied an evidentiary standard of review when determining whether her claims rose to the status of an adverse action, and a heightened evidentiary standard by requiring that she submit a Local Rule 56.1 Statement (App., 209a), before the Defendants answered her amended complaint.

This Court, in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) held

> An employment discrimination complaint need not contain specific facts establishing a prima facie case under the *McDonnell Douglas* framework, but instead must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief, *Fed. Rule Civ. Proc.* 8(a)(2). *** Under the Second Circuit's heightened pleading standard, however, a plaintiff without direct evidence at the time of his complaint must plead a prima facie case of discrimination even though discovery might uncover such direct evidence.

Petitioner submits that facts of this case clearly show that Sanks claims met the *Swierkiewicz* standard of review and that is why defendants never challenged many of her claims.

When dismissing the retaliation claims which the Court had already determined presented prima facie claims, the Court again failed to use the summary judgment standard of review, i.e., whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits *. . . show that there is no genuine issue as to material fact and*

that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Silver v. City Univ.*, 947 F.2d 1021, 1022 (2d Cir. 1991). The District Court failed to heed the rule that "The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists." *Rodriguez v. City of New York*, 72 F.3d 1051, 1060-61 (2d Cir. 1995) or the rule which says that when "determining whether a genuine issue of material fact exists, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Gibbs-Alfano v. Burton*, 281 F.3d 12, 18 (2d Cir. 2002). (emphasis added).

Petitioner submits that the District Court acted as a fact finder and weighed the evidence when he was supposed to be applying summary judgment rules. For example: Sank claimed that the administration deliberately placed bogus prerequisites for her classes in the college catalogue to deter student registration. When Sank discovered the errors, she immediately reported it to the Registrar, her chair and Dean, who all denied the ability to (or could) correct the errors. The Provost (Dr. Barba) submitted an affidavit in which he stated that he immediately told the Registrar to do the correction. The Registrar then told a college administrator to do the corrections. As proof of the correction, Barba attached a computer printout showing the correction. The District Court thought that Barba's affidavit was credible and printout were credible, despite Petitioner's argument that the affidavit was triple hearsay and violated *Fed. R. Evid. Rule* 803(6) hearsay business records exception.

In conclusion, Petitioner asks that this court grant certiorari to settle the aforementioned standards of review which have long been neglected by this Court.

VI. THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO EXERCISE SUPERVISORY POWER OVER LOWER COURTS TO INSTRUCT THEM ON THE ABUSE OF ISSUING UNPUBLISHED OPINIONS THAT ARE BEREFT OF ANALYSIS AND REASONING APPLIED TO THE ISSUES REVIEWED, THEREBY BURDENING A

PETITIONER AND MAKING THIS COURT'S REVIEW UNNECESSARILY DIFFICULT.

In 1999, *Forbes Magazine* reported that "federal appeals judges disposed of 79% of the 26,819 cases they decided by issuing so-called unpublished decisions, up from 37% in 1977. Over 7% of the unpublished decisions consisted of a single word. Whether curt or long-winded, an unpublished decision isn't precedent. That means the judges can be sloppy. They are not accountable for illogic or inconsistency in the rulings." (App., 233a).

The article was called appropriately, "Justice in the Dark." (App., 232a-246a).

Petitioner, *pro se*, comes to this court from a case she litigated for 16 years. She has survived nine written decisions and over 200 miscellaneous orders, motions, etc.

Petitioner respectfully requests that this Court exercise its supervisory power to instruct the Circuit Courts as to the harm they do to parties like herself who come before them for just decisions but instead receive unpublished decisions that do not speak to the issues presented on appeal or contain reasoning or analysis for their rulings. Petitioner makes this request for herself and the thousands of Petitioners similarly situated.

Petitioner submits that her unpublished decision was fundamentally unfair, with little attempt at due process and equal protection of the applicable laws. Furthermore the decision below is an insult to this Court inasmuch as it too needs a proper judicial record to review.

CONCLUSION

For all of the aforementioned reasons, Petitioner submits that a Writ of Certiorari is warranted and should be granted.

Respectfully submitted, November14, 2004

DIANE SANK, *pro se*

(2) Supreme Court, U.S.
FILED
04 672 NOV 15

No. _____

In The
Supreme Court of the United States
October Term, 2004

DIANE SANK,

Petitioner,

v.

THE CITY UNIVERSITY OF NEW YORK, ET AL,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

APPENDIX A, pp. 1a-110a
TO PETITION FOR WRIT OF CERTIORARI

Diane Sank
Petitioner *Pro Se*
173 Charlotte Place
Englewood Cliffs, NJ 07632
(201) 569-7297

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United states Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 17th day of August two thousand and three [sic].

Present: ROSEMARY S. POOLER
ROBERT D. SACK
REENA RAGGI,
Circuit Judges

(stamp
UNITED STATES COURT OF APPEAL
FILED
AUG 17 2004
Roseann B MacKechnie, CLERK
SECOND CIRCUIT

03-7677-cv (L)
03-7678-cv (CON)

DIANE SANK,
Plaintiff-Appellant,

-v-

THE CITY UNIVERSITY OF NEW YORK; JOSEPH S. MURPHY; W. ANN REYNOLDS; JAMES P. MURPHEY; THE BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK, *AS CONSTITUTED AS OF APRIL 1988*; PAUL P. BAARD, BLANCHE BERSTEIN, SYLVIA BLOOM, MARIA JOSEFA CANINO, LOUIS C. CENCI, ARMAND D'ANGELO, JUDAH GRIEBETZ, WILLIAM R. HOWARD, HAROLD M. JACOBS, FLERIDA NEGRON, ROBERT L. POLK, JOAQUIN RIVERA, J.D., MARGARET A. TITONE, SHIRLEY ULLMAN WEDEEN, BRENDA FARROW WHITE, AND "JOHN DOE" I THROUGH X, (*X BEING A NUMBER AS YET UNDETERMINED SAID NAME BEING FICTITIOUS AND PRESENTLY UNKNOWN*), AND "JANE DOE" I THROUGH X, (*X BEING A NUMBER AS YET UNDETERMINED SAID NAME BEING FICTITIOUS AND PRESENTLY UNKNOWN*); AND GLADYS CARION, MICHAEL J. DEL GUIDICE, EDITH B. EVERETT, STANLEY FINK, CHARLES E. INNIS, JEAN C. LAMARRE, SUSAN MOORE MOURNER, ABDULLAH MUHAMMAD, GREGORIO

[page 2]

MAYERS, ROBERT A. PICKENS, CALVIN O. PRESSLEY, RONALD QUARTIMON, THOMAS TAM, AND; THE BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK, *AS CONSTITUTED AS OF C. JUNE AND C. SEPTEMBER 1989*; THE BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK, *AS CONSTITUTED AS OF C. JUNE AND C. SEPTEMBER 1990*; THE BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK, *AS CONSTITUTED*

AS OF APRIL 1991; THE BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK, *AS CONSTITUTED AS OF APRIL 1992*; BEVERLY SOWANDE; THE CITY COLLEGE OF NEW YORK; BERNARD W. HARLESTON, ANTHONY F. RODRIGUEZ, JEFFREY J. ROSEN, CAROL LADERMAN, FREMONT E. BESNER, JUNE NASH, THE COMMISSION ON HUMAN RIGHTS OF THE CITY OF

NEW YORK, DENNIS DELEON, RANDOLPH ("RANDY") WILLS, ESQ., STEPHANIE ORTELEIVA, LIZBETH SCHALET,

Defendants-Appellees.

Appearing for Plaintiff-Appellant: DIANE SANK, pro se, Englewood Cliffs, NJ.

Counsel for Defendants- Appellees: ROBERT H. EASTON, State of New York Office of the Attorney General, New York, NY.

Appeal from the United States District Court for the Southern District of New York (Sweet, J.).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the District Court's order is AFFIRMED.

Plaintiff-appellant, appearing pro se, challenges numerous rulings by the district court York (Sweet, J.) in a case arising from her 1988 removal as chair of the anthropology department of the City College of New York ("CCNY"), and the 1989 dismantling of her laboratory. After nine separate opinions were issued and a six-day bench trial was held on Sank's Title VII claims, all of her claims were dismissed. We conclude that all of her arguments on appeal are without merit. We, however, discuss in brief some of her contentions.

Reviewing de novo the district court's May 24, 1995 order pursuant to Fed. R. P. 12(b)(6) dismissing Sank's section 1983 due process claim, see Posr v. Court Officer Shield No. 207, 180 F.3d 409, 413 (2d Cir. 1999), and drawing all inferences in Sank's favor, id., we conclude that, because these claims were premised on events occurring in 1988 and 1990 and Sank did not file suit until January 1994,

her claims were barred by the 3-year New York statute of limitation to file a 43 U.S.C. § 1983 complaint. See Owen v. Okure, 488 U.S. 235, 251 (1989); McKinney's C.P.L.R. § 214. Sank has asserted no reason that is sufficient to toll the statute of limitations.

[page 3]

Reviewing de novo the district court's November 10, 1995 order pursuant to Fed. R. Civ. P. 12(b)(6) dismissing Sank's claims against the individual staff's attorney of the New York City Commission on Human Rights, we conclude that dismissal was appropriate because these defendants are absolutely immune from liability. When they issued a decision in Sank's case, there were acting completely within their prosecutorial capacity. See Rudow v. City of N.Y., 822 F.2d 324, 327-28 (2d Cir. 1987).

Reviewing de novo the district court's June 26, 1997 order dismissing Sank's remaining Title VII claims against the individual CUNY defendants, we conclude that dismissal was appropriate because "under Title VII individual supervisors are not subject to liability." Mandell v. County of Suffolk, 316 F.3d 368, 377 (2d Cir. 2003).

Reviewing de novo the district court's April 8, 2002 order granting summary judgment and dismissing Sank's contract claim against defendants CCNY and CUNY, see Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 300 (2d Cir. 2003), we conclude that, because CUNY and its colleges are an "arm of the state," CUNY and CCNY are immune from Sank's breach of contract claims pursuant to the Eleventh Amendment. See Clissuras v. City Univ. of N.Y., 359 F3d 79, 83 (2d Cir. 2004) (per curiam); U.S. CONST. Amend. XI.

Reviewing the district court's April 12, 2002 discovery order for abuse of discretion, see Independent Order of Foresters v. Donald Lufkin & Jenrette, Inc., 157 F.3d 933, 937 (2d Cir. 1998), we conclude that the district court acted well within its "wide discretion" when it deneid [sic] Sank's

request for personnel information concerning 700 individual employees of CUNY. In re Fitch, Inc., 330 F.3d 104, 108 (2d Cir. 2003), Sank had already received information regarding 297 individuals and did not sufficiently explain why the additional 700 names had not been included in her original discovery requests or demonstrate that further personnel disclosures were likely to produce evidence supportive of her claims. Under these circumstances, the district court could reasonably deny additional discovery as "unreasonabley [sic] cumulative or duplicative," as well as unduly burdensome relative to any likely benefit. Id.; FED. R. CIV. P. 26(b)(2).

Sank alleges that the district court committed several errors or acted improperly during the six-day bench trial, held between September 30 and October 7, 2002. We dispose of these contentions as follows: First, the district court acted well within its discretion pursuant to Fed. R. Evid. 403 in denying Sank's request to introduce evidence about a change in school policy regarding academic advising that had not been pleaded in her complaint. See Perry v. Ethan Allen, Inc., 115 F.3d 143, 150 (2d Cir. 1997). Second, although during the trial the court engaged in a short ex parte discussion with defense counsel regarding a procedural matter, because no decisions were made during this discussion, and the court immediately informed Sank when she returned that the conversation occurred and a record of the conversation was available, we conclude that this discussion did not affect the fairness of the trial and therefore does not warrant a reversal. See Robinson v. Cattaraugus County, 147 F.3d 153, 164-65 (2d Cir. 1998). Third, Sank's allegation that the district court was biased is not supported by the record. Instead, it is clear that the court afforded her every opportunity to fully prosecute her claims. Fourth, although the district court permitted her to call 22 of 41 proposed witnesses, Sank complains that her witness list at trial was unduly restricted. We conclude that the district [sic] did not abuse its discretion in so limiting the number of witnesses at trial. Fed. R. Civ. P. 403; cf. United States v.

Holmes, 44 F.3d 1150, 1157 (2d Cir. 1995) holding that, even in criminal cases where

[page 4]

the defense right to present witnesses is constitutionally protected, a trial court has the discretion to limit the number of witnesses at trial in order to "to exclude irrelevant, repetitive, or cumulative evidence.").

Fifth, we conclude that the district court did not commit clear error in holding that Sank failed to prove that her removal as chair of her department or the moving of her laboratory to a different part of the college violated Title VII. Cosme v. Henderson, 287 F.3d 152, 159 (2d Cir. 2002). The evidence at trial showed that Sank was removed pursuant to a recommendation from an outside review committee and that her laboratory was dismantled and relocated due to a need for space in the academic building. The court did not commit clear error in finding that defendants had submitted a legitimate nondiscriminatory explanation for these actions and that Sank had failed to show that these explanations were pretextual.

Reviewing the district court's April 7, 2003 order dismissing Sank's other retaliation claims premised on actions occurring after 1991, we conclude that dismissal was appropriate because (1) insofar as these claims were premised on retaliatory acts that were not alleged in the complaint, the district court did not abuse its discretion in refusing to permit Sank to amend her complaint to include these claims because these claims were raised late in litigation and not until eight to eleven years after they occurred. See Goss v. Revlon, Inc., 548 F2d 405, 407 (2d 1976) (per curiam) (undue delay is an appropriate basis to deny a motion to amend the pleadings); (2) the remaining claims of retaliation were properly dismissed because Sank failed to make out a prima facie case that these acts were retaliatory employment actions or that defendants' explanation for these actions were pretextual.

We therefore AFFIRM.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk
By:
/s/ Lucille Carr

DECIDED: August 17, 2004
CITATION: *Sank v. City Univ. of N.Y.*, 03-7677-cv (L), 03-7678-cv (CON), LEXIS 17245 (2nd Cir. 8/17/2004)

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UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
DIANE SANK,

Plaintiff,

- against - 94 Civ. 0253 (RWS)

THE CITY UNIVERSITY OF NEW YORK, JOSEPH MURPHEY, et al., OPINION

Defendants.
----------X

APPEARANCES:

DIANE SANK
Plaintiff Pro Se
173 Charlotte Place
Englewood Cliffs, NJ 07632

HON. ELIOT SPITZER,
Attorney General of the State of New York,
Attorney for Defendants,
120 Broadway
New York, NY, 10271
By: STEVEN L. BANKS
Assistant Attorney General
Of Counsel

[page 1]

Sweet, D.J.,

Plaintiff pro se Diane Sank ("Sank") has moved (1) pursuant to Rule 52(b) of the Federal Rules of Civil Procedure

to amend the findings of fact and conclusions of law on October 7, 2002 after the close of a bench trial denying the relief sought by her on her complaint alleging a discrimination claim and pre- November 21, 1991 retaliation claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), codified at 42 U.S.C. §§ 2000e et seq., and (2) pursuant to Local Rule 6.3 of the Southern District of New York ("Local Rule 6.3") for this Court to reconsider its opinion dated April 4, 2003 granting defendant City University of New York ("CUNY") summary judgment on Sank's remaining retaliation claims, which arose after November 21, 1991.

For the following reasons, those motions are denied.

Prior Proceedings

The parties and proceedings have been described in greater detail in Sank v. City University of New York, 219 F. Supp. 2d 497 (S.D.N.Y. 2002), familiarity with which is presumed.

Sank commenced this action almost a decade ago, on January 18, 1994, alleging, inter alia, that the president of the City College of New York ("CCNY"), Bernard Harleston ("Harleston"),

[page 2]

had removed her as chairperson of the CCNY Anthropology Department (the "Department") in 1988 because of her gender, race, religion and age, and subsequently retaliated against her after she filed a charge of discrimination with the New York City Commission on Human Rights ("NYCCHR").

Following more than eight years of litigation and the dismissal of certain of Sank's claims, a six-day bench trial was held from September 30, 2002 to October 7, 2002, to resolve Sank's Title VII claims. The claims at issue at the bench trial were those remaining claims that were alleged to have

occurred prior to the effective date of the amended Civil Rights Act, November 21, 1991, and as to which Sank was not entitled to a jury trial. These claims were that CUNY: (1) discriminated against Sank on the basis of race and gender when Harleston removed her as Department chairperson; and (2) retaliated against Sank by removing her from her assigned laboratory space and by denying her request for a full-pay sabbatical leave. At the conclusion of testimony, it was held that Sank had failed to sustain her burden of establishing by a preponderance of the evidence a cause of action of discrimination in violation of Title VII. In addition, it was held that Sank had not established a prima facie case of retaliation in the taking of her laboratory space or denial of her leave application. Those claims were therefore dismissed.

[page 3]

Sank moved on March 25, 2003 to amend the Court's findings of fact and conclusions of law. CUNY responded on May 29, 2003, and the motion was considered fully submitted on June 13, 2003.[1]

After the conclusion of the bench trial, Sank continued to have viable claims in the form of alleged acts of retaliation which had occurred after November 21, 1991, which had not been dealt with at the bench trial because such claims entitled Sank to a jury trial. Because Sank had not specified these claims until shortly prior to the bench trial and because CUNY therefore had not had an opportunity to seek summary judgment on such claims, CUNY was permitted to move against such claims. The defendants moved against the remaining claims on December 4, 2002, and the motion was considered fully submitted on March 19, 2003. By order dated April 4, 2003 (the "April 4 Order"), summary judgment was granted to CUNY, and Sank was denied permission to replead her complaint to include new retaliation claims.

On May 5, 2003, Sank moved for reconsideration of the April 4 Order. The motion was considered fully submitted on June

[1] According to Local Rule 6.1, Sank was required to submit reply affidavits within five business days of service of the opposition papers. In a letter dated June 5, 2003, Sank noted that she had received CUNY's opposition on May 31, 2003. Thus, although it had been ordered that the motion should be submitted on June 4, 2003, Sank had five business days after May 31, or until June 6, 2003, to submit her reply papers. Sank sought and obtained an extension to June 13, 2003.4, 2003.

[page 4]

4, 2003, along with Sank's other motion to amend the findings of fact and conclusions of law.

Discussion

I. Standard of Review

Rule 6.3 is intended to "ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." Carolco Pictures, Inc. v. Sirota, 700 F. Supp. 169, 170 (S.D.N.Y. 1988) (citation omitted). The parties may not present new facts or theories at this stage. Ralph Oldsmobile Inc. v. General Motors Corp., 2001 U.S. Dist. LEXIS 421, 2001 WL 55729, at *2 (S.D.N.Y. Jan. 23, 2001) (striking affidavit that was filed in support of motion to reconsider without court's permission); Primavera Familienstifung v. Askin, 137 F. Supp. 2d 438, 442 (S.D.N.Y. 2001) (party may not "advance new facts, issues or arguments not previously presented to the Court") (quoting Morse/Diesel Inc. v. Fidelity & Deposit Co. of Md., 768 F. Supp. 115, 116 (S.D.N.Y. 1991). "To succeed on a motion for reargument, the moving party must demonstrate that the court overlooked the controlling decisions or factual matters that were placed before the court in the underlying motion." Lopez v. Comm'r of Soc. Sec., 2002 U.S. Dist. LEXIS 5091, *1-*2 (S.D.N.Y.

March 27, 2002) (quotations and citations omitted); see also Shrader v. CSX Transp., 70 F.3d 255, 257 (2d Cir. 1995) (motion for

[page 5]

reargument "will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked -- matters, in other words, that might reasonably be expected to alter the conclusion reached by the court").

Rule 6.3 must be narrowly construed and strictly applied so as to avoid duplicative rulings on previously considered issues, and may not be employed as a substitute for appealing a final judgment. Lopez, 2002 U.S. Dist. LEXIS 5091, at *3; Shamis v. Ambassador Factors, 187 F.R.D. 148, 151 (S.D.N.Y. 1999). The decision to grant or deny the motion rests in the discretion of the district court. AT&T Corp. v. Community Network Servs. Inc., 2000 U.S. Dist. LEXIS 11894, 2000 WL 1174992, at *1 (S.D.N.Y. Aug. 18, 2000).

The standard governing consideration of a motion for an amendment of findings of fact under Rule 52(b)[2] is the same as for a motion for reconsideration under Local Civil Rule 6.3, as discussed above. 4200 Avenue K LLC v. Fishman, 2001 U.S. Dist. LEXIS 5938, at *2, No. 00 Civ. 8814 (S.D.N.Y. May 10, 2001) (applying Local Rule 6.3 standards). See also United States v. Local 1804-1, Int'l Longshoreman's Ass'n, 831 F. Supp. 167, 169 (S.D.N.Y. 1993) (Rule 52(b) can correct "manifest errors of law or fact," but cannot be used to "relitigate old issues, to advance new theories, or to secure a rehearing on the merits"); Bldg. Serv. 32B-J Pension

[2] Rule 52(b) provides that, upon motion, a court "may amend its findings -- or make additional findings -- and may amend the judgment accordingly."

[page 6]

Fund v. Vanderveer Estates Holding, LLC, 2001 U.S. Dist. LEXIS 2453, at *4, No. 00 Civ. 364 (S.D.N.Y. March 13, 2001) (denying motion under Local Rule 6.3 and Rule 52(b) where movant sought to introduce new evidence).

In addressing the present motion, the Court is also mindful that the plaintiff is proceeding pro se and that her submissions should be held "'to less stringent standards than formal pleadings drafted by lawyers . . . .'" Hughes v. Rowe, 449 U.S. 5, 9, 101 S. Ct. 173, 176, 66 L. Ed. 2d 163 (1980) (per curiam) (quoting Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 595, 30 L. Ed. 2d 652 (1972)); see also Ferran v. Town of Nassau, 11 F.3d 21, 22 (2d Cir. 1993). Nevertheless, pro se status "'does not exempt a party from compliance with relevant rules of procedural and substantive law." Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983) (quotations omitted).

II. Motion to Amend Findings of Fact and Conclusions of Law

Sank has submitted a 187-page brief in support of her motion to amend the findings of fact and conclusions of law with regard to both her discrimination and retaliation claims. About 100 pages into her brief in support of her motion to amend, Sank expresses her frustration as a pro se plaintiff in trying to prove motive and pretext. Pls.' Mem. at 100. It should be noted, however, that such frustrations are not limited to pro se plaintiffs, as both concepts -- and pretext in particular -- are

[page 7]

difficult to prove. E.g., Vandewalker v. Quandt's Food Serv. Distribs. Inc., 934 F. Supp. 42, 46 (N.D.N.Y. 1996) ("discriminatory intent is notoriously difficult to prove"). Sank simply did not show that the legitimate non-discriminatory reasons proffered by CUNY were mere pretext, and she now fails to cite to any evidence that was presented or controlling

authorities that were overlooked that would result in a different outcome.

A. Discrimination Claims

Claims of discrimination under Title VII are analyzed under the three-part test announced in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). First, the plaintiff must establish a prima facie case of discrimination by showing that (1) she is a member of a protected class and (2) she suffered an adverse employment action (3) under circumstances that give rise to an inference of unlawful discrimination. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981); Weinstock v. Columbia Univ., 224 F.3d 33, 42 (2d Cir. 2000). Second, if the plaintiff successfully establishes a prima facie case of discrimination, the defendant may rebut that showing by articulating a legitimate, non-discriminatory reason for the employment action. Burdine, 450 U.S. at 254; Weinstock, 224 F.3d at 42. Finally, if the defendant articulates a non-discriminatory reason, the plaintiff must come forward with evidence that the defendant's articulated non-discriminatory reason is a mere pretext for actual discrimination.

[page 8]

Weinstock, 224 F.3d at 42 ("The plaintiff must 'produce not simply some evidence but sufficient evidence to support a rational finding that the legitimate non-discriminatory reasons proffered by the [defendant] were false and that more likely than not [discrimination] was the real reason for the'" employment action (quotations and citations omitted; brackets in original)). Whether a judgment as a matter of law is appropriate depends upon a number of factors, including the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case. Reeves v.

Sanderson Plumbing Products, Inc., 530 U.S. 133, 148-49, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000).

Sank asserts that judgment should have been entered for her on the discrimination claim due to a number of factors. In particular, Sank argues that the Court erred in finding that (1) the Outside Review Committee ("ORC") Report (the "ORC Report") was a legitimate non-discriminatory reason, (2) that Harleston's recommendation that Jones be chairperson of the Department was ratified by the Department, and (3) that the ORC Report was not a mere pretext for discrimination.

In support of her argument, Sank outlines a number of points, which are not clearly delineated in her brief. At least twenty were able to be discerned upon review, which loosely fit into her overall objections to the Court's findings.

[page 9]

With regard to the ORC Report, Sank points to the following: (1) Harleston failed to act upon any other recommendations in the ORC Report; (2) the problems noted in the ORC Report existed prior to Sank's taking office; (3) Harleston permitted an insider to be elected after Jones resigned after one year; (4) Harleston's record of minority appointments, and that such appointments were not a fulfillment of affirmative action guidelines; (5) Harleston's membership in a black fraternity, Sigma Pi Phi; (6) the lack of interviews of the two candidates, who were white and female, other than Jones; (7) Sank's discharge and the replacement by Jones occurred simultaneously; (8) the By-Law by which Harleston had authority to discharge Sank was used for the first and apparently only time by Harleston in this instance; (9) Harleston ignored a Faculty Senate Resolution to return Sank to the chairpersonship; (10) Harleston allowed members of the Department to serve on the search committee for a new chair after Jones resigned despite admonitions to the contrary in the ORC Report; (11) Harleston used the term "chairman," rather

than "chairperson," to refer to Sank; and (12) the issue of Jones' appointment was not put on the public calendar of the Board of Trustees meeting such that Sank could participate in discussions thereon.

Sank claims the purported Department ratification was suspect because (1) Harleston previously had threatened to disband the Department; (2) there was no discussion of the ORC Report; (3) Harleston merely asked if Jones were acceptable, rather than ask

[page 10]

for a ratification; (4) Harleston supposedly reminded the single black professor in the Department of Harleston's support; and (5) Professor June Nash received a distinguished professorship two years after the vote in question. Sank also generally objects to the testimony of Harleston and Professor Owen Lynch ("Lynch"), a member of the ORC. Finally, Sank also challenges an evidentiary ruling excluding the testimony of members of the Board of Trustees. Each will be addressed in turn.

As a general comment, it should be noted that many times Sank does not support her claims with any citation to the record, either because she failed to fill in blanks of citations or because she failed to include any sort of citation whatsoever. The latter almost always constitute instances where Sank relies solely on speculation, opinion and argument. There is no doubt that Sank truly believes that she was discriminated against, and believes that the evidence should be construed in such a way as to support her beliefs. Unfortunately, Sank's belief alone is insufficient in light of the absence of evidence to support those beliefs and the evidence that contradicted it.

1. <u>The ORC Report</u>

The Court at trial already specifically considered four of the allegations above, and they were found insufficient to establish Sank's clam of race or gender discrimination under Title

[page 11]

VII. These were: (1) Harleston's membership in Sigma Pi Phi, a black fraternity dedicated to promoting the interests of black males in education and business (Tr. at 821-22); (2) Harleston's use of the word "chairman" in the removal letter (Tr. at 504); (3) evidence of Harleston's efforts toward minority hiring (Tr. at 822); and (4) the election of Professor Besmer, a white male "insider" of the Department, as acting chairperson of the Department for the 1989-90 academic year by the Executive Committee after the departure of Del Jones.

Sank also misconstrues one finding by the Court related to Harleston's hiring practices. She claims that the Court found that Harleston would have inappropriately appointed black candidates who were not as qualified as non-black candidates. Instead, after hearing Harleston's testimony and observing his demeanor, it was found that Harleston recognized the importance of ethnic balance at a university in which four out of five students are minorities and that he engaged in an aggressive affirmative action program which was "entirely appropriate." There was no evidence presented that Harleston had ever appointed a less qualified black candidate, except that Sank has alleged that Jones, who was recommended by the ORC Report, was less qualified than two other professors who were recommended. In light of the fact that Jones was a nominee by the ORC, and in light of the fact that Sank has failed to discredit that report, Jones cannot be said to have been unqualified. Thus, the only finding with regard to Harleston's

[page 12]

practices was a recognition that he aggressively attempted to hire qualified minority candidates.

In addition, Sank's accusation that the Outside Review Committee report (the "ORC Report") was without basis was also considered and rejected by the Court. Tr. at 824. This finding involves several of Sank's re-presented facts, including: (1) the problems noted in the ORC Report existed prior to Sank's taking office; and (2) the lack of interviews of the two candidates, who were white and female, other than Jones. As noted in the opinion, any factual inaccuracies or mistakes in the ORC Report are not the subject of this lawsuit. CUNY acted upon the ORC Report, and therefore, in the absence of any evidence that it did so with the knowledge that such report was a fabrication -- and no such evidence has been presented -- Sank's contentions are irrelevant.

Sank also contends that Harleston failed to implement certain of the recommendations of the ORC Report and, in fact, only implemented that portion concerning her replacement as Department chairperson. Harleston testified, however, that he was not directly responsible for the implementation of the other recommendations concerning, for instance, the Department's staffing, retention of the Department secretary, or its academic programs. Therefore, Harleston was not acting discriminatorily in not doing other officials' jobs.

[page 13]

Sank also alleges that the ORC Report was a pretext because Harleston purportedly did not follow it as he permitted members of the Department to join the search committee for a new chair despite admonitions to the contrary. First, Sank does not support her contention with any evidence that Harleston was in fact in charge of selecting the search committee. Second, even if such evidence were presented, it may be explained by Harleston's testimony of his belief that a measure of "calm" had returned to the Department after Jones' appointment.

With regard to the ORC Report, Sank also counter-factually alleges that Harleston exerted influence over the members of the ORC to have them recommend her removal. Harleston and one of two members of the ORC, Professor Owen Lynch, testified that no discussion took place between Harleston and the ORC about Sank or her removal.

Sank's present contention that her discharge and the replacement by Jones occurred simultaneously was rejected by the Court after trial, and Sank has presented no evidence or controlling authority that was not considered at the time. Indeed, she merely reargues the point.

The issue of the Faculty Senate Resolution in support of Sank and the fact that Jones' appointment was apparently not put on

[page 14]

the public Board of Trustees' calendar are simply irrelevant to the issue of Sank's discharge.

Finally, while it is interesting that the By-Law used to remove Sank was first (and apparently last) used by CUNY to remove Sank from her position, the other evidence outweighs this fact, particularly given the existence of the ORC Report and CUNY's demonstrated reliance on it.

2. <u>Department Ratification</u>

As a general matter, the issue of the Department's "ratification" of the ORC Report and of Jones is less relevant, given the finding that Sank's discharge was not simultaneous with Jones' appointment. In addition, Sank fails to establish on the record any of the following allegations, except that she refers to the transcript with regard to Harleston's threat but

ails to cite specific pages. Sank's arguments will nonetheless e addressed.

The fact that Harleston had threatened the Department with disbanding was well-known and failed to establish that the Department was not at least partially in accord with Harleston in light of the other evidence presented.

The allegation that there was no discussion of the ORC Report does not in itself establish that the vote was a sham and

[page 15]

pretextual. No additional evidence with respect to the absence of discussion has been presented.

The allegation regarding Harleston's choice of diction is completely irrelevant. Harleston's purported asking whether Jones was acceptable was, in effect, a request for ratification of the Report.

The fourth argument, if proven, could provide evidence that Harleston was strong-arming the voting mechanisms of the Department. Such strong-arming -- which could also be called by its nicer alias, "politicking" -- nonetheless does not go to show that Sank was discharged because of Harleston's efforts to appoint Jones. As noted above, Sank has failed to present evidence or controlling authority that her discharge and the hiring of Jones were simultaneous acts.

Finally, no evidence was introduced to support the theory regarding Nash's vote and, in fact, Nash obtained the professorship two years after the vote in question. Such a time lag belies a connection between the two events. In the absence of any evidence that Nash's vote was related to Harleston's purported animus, this evidence also falls short.

[page 16]

3. <u>Testimony of Harleston and Lynch</u>

Sank points out several instances where Harleston and Lynch were unable to recall, or misremembered, small details. Moreover, Sank spends a great many pages recounting her cross- examination of Harleston, and arguing that Harleston's forthright denials of her allegations must have greater meaning. Having heard the testimony about which Sank objects, and in light of the fact that the witnesses were testifying about events that occurred from 1987 to 1991 -- more than ten years prior to the time of their testimony -- such inconsistencies are not the smoking guns Sank would have them be and are insufficient to justify granting Sank's motion.

4. Evidentiary Objection

Finally, Sank in a footnote contends that she should have been permitted to call as witnesses members of the Board of Trustees. She fails to present any evidence or controlling authority in support of this point, nor has she established the relevance of such testimony. She did not provide a deposition, affidavit, or even an informal document that would provide the nature of such testimony. Presumably, such testimony would go to her complaint, above, that the issue of Jones' appointment was not on the public calendar. As noted above, this issue is not relevant

[page 17]

to Sank's discharge given the finding that Sank's discharge was not simultaneous with Jones' appointment.

In sum, there is no dispute that the Department had experienced a great deal of turmoil at the time of Sank's removal. Further, the ORC report suggested, in response to such turmoil, that Sank be removed as chairperson. The fact that Sank was replaced by a black man, who had been suggested as one of three candidates by the ORC, is insufficient to win the day without any other indicia of

discrimination. Sank has failed to substantiate any of her beliefs about such discrimination with citations to evidence that was presented but was overlooked by the Court in making its findings of fact and conclusions of law. As a result, Sank's motion to amend the findings of facts and conclusions of law with regard to her discrimination claim is denied.

B. Retaliation Claims

Sank asks for amendment of the findings with respect to both retaliation claims: (1) the taking of her lab space, and (2) the denial of full-pay sabbatical leave.

A Title VII retaliation claim is analyzed under the rubric of McDonnell Douglas. Tomka v. Seiler Corp., 66 F.3d 1295, 1308 (2d Cir. 1995). First, in order to make out a prima facie case of retaliation, a plaintiff must establish that (1) she

[page 18]

engaged in protected activity; (2) defendants were aware of the activity; (3) she was subjected to an adverse employment action; and (4) there is a causal connection between the protected activity and the adverse employment action. Gordon v. New York City Bd. of Ed., 232 F.3d 111, 116 (2d Cir. 2000); Quinn v. Green Tea Credit Corp., 159 F.3d 759, 768-69 (2d Cir. 1998). The Second Circuit has held that a close temporal relationship between the protected activity and an employer's adverse actions can be sufficient to establish causation. Treglia v. Town of Manlius, 313 F.3d 713, 720 (2d Cir. 2002) (citing Cifra v. General Elec. Co., 252 F.3d 205, 217 (2d Cir. 1998) ("The causal connection needed for proof of a retaliation claim can be establish indirectly by showing that the protected activity was closely followed in time by the adverse action.") (internal quotation marks omitted)). For mere temporal proximity to establish causality, the intervening period must be "very close." Clark Co. Sch. Dist. v. Breeden, 532 U.S. 268, 273, 149 L. Ed. 2d 509, 121 S. Ct. 1508 (2001).

If the plaintiff establishes a prima facie case of retaliation, the defendant may articulate a legitimate, non-retaliatory reason for its actions. Id. at 768. Finally, if the defendant does so, the plaintiff must prove that the proffered reason is merely a pretext for retaliation. Id. at 769.

[page 19]

1. Lab Space

Sank begins by referring to inadmissible hearsay evidence that Harleston was "enraged" by the June 27, 1989 amendment to her charge that added a claim of race discrimination. Such evidence is inadmissible and cannot further Sank's cause, particularly given the lack of evidence connecting Harleston and the official who made the decision that resulted in Sank's removal from her laboratory, Anthony Rodriguez Pacheko ("Pacheko"),[3] a licensed architect who served as assistant vice-president for facilities and space planning at CUNY from January 1988 to May 1990.

Sank has challenged the truthfulness of Pacheko's testimony. As noted in the decision from the bench, however, Pacheko was an "entirely credible, forthright and direct" witness, based upon observation of his testimony. Pacheko, who was responsible for the master planning efforts at CCNY, testified that at the time he arranged for the taking of Sank's lab, he did not know Sank, nor was he aware of her claims of discrimination. Moreover, he testified that the change was made as part of a college-wide renovation, in which approximately one-fifth of the campus would be relocated over a four-year period. Finally, he credibly testified that he did not confer with Harleston regarding any decision he made with regard to allocation of space.

[3] Pacheko was known as "Anthony Rodriguez" during the relevant period.

[page 20]

Sank claims that he is not credible because she has presented contradictory evidence, in which a member of the Computer Sciences Department does not remember asking for lab space to be connected by a door, but only remembers mentioning that such a situation could be useful. Having observed Pacheko's testimony, and given the passage of years, such evidence is insufficient to call his testimony into doubt.

Sank also notes that Pacheko had been forewarned that taking Sank's laboratory would cause problems. Such forewarning does not mean that he made the decision to injure Sank. Given the widespread nature of the reallocation of space that Pacheko oversaw, it is likely that problems would arise no matter what space was taken, and Pacheko would not have been fulfilling his obligations to CUNY had he taken any one person's potential unrest too seriously.

Further, Sank appears to assert that Pacheko's offer to Sank of an alternative lab space was some sort of buy-off. Pacheko's forthright testimony regarding this offer, however, establishes that he offered Sank the alternative lab space because she was upset, and Pacheko was trying to minimize any dislocation as best he could.

Sank also notes that Pacheko apparently failed to communicate with the Department about the decision to take her lab,

[page 21]

while he also apparently communicated at great length with another department. Such claim is not adequately supported by the record and, in any case, is likely explained by Pacheko's belief that the lab was inactive. Sank also claims that Pacheko should not have thought that the lab was inactive, given the fact that he observed it during the summer session, but Pacheko's testimony that he truly believed the lab was inactive was persuasive.

All of these complaints also must be considered with the understanding that the events complained of took place approximately thirteen years prior to the testimony at trial.

Finally, Sank questions why Pacheko took vacation in July 1989, during which time the move occurred. Sank does not present any evidence that Pacheko normally did not take vacation during July (a time period when Sank admits many professors are not required to be at work) or that he purposefully took vacation to thwart her efforts to retain her laboratory space.

As a result, even if Sank proved her prima facie case which she has not, given Pacheko's lack of knowledge of the discrimination charge, she certainly failed to prove that the proffered reason for the moving of her laboratory -- the campus- wide renovations -- was a pretext. Nor has she presented any evidence that was presented at trial that would result in a

[page 22]

contrary determination. Her motion on this ground is therefore denied.

2. Leave Time

Sank argues that the timing of the denial of her leave application and the participation by phone of members of the Department's Executive Committee during the consideration thereof should have been sufficient to suggest a retaliatory pretext. It was held, however, that even considering the college's process in review of her sabbatical application, Sank had failed to establish a prima facie case of retaliation. Moreover, she has not presented any evidence on the record that was not considered that would result in a different finding. As a result, her motion on this ground is also denied.

III. Motion for Reconsideration of the April 4 Order

It should be noted at the outset that Sank has asserted that her motion for reconsideration of the April 4 Order is motivated by her concerns with the description of her lawsuit "as a vehicle to litigate grievances by a tenured professor at war with the administration of her college." April 4 Order, at 37. Sank is upset, in particular, at the use of the term, "at war," and asks that the phrase be stricken from the opinion.

[page 23]

According to Black's Law Dictionary, "war" is not only a "hostile conflict by means of armed forces, carried on between nations, states or rulers, or sometimes between parties within the same nation or state." Black's Law Dictionary 1576 (7th ed. 1999) Instead, alternative definitions include: "(2) [a] dispute or competition between adversaries," and "(3) a struggle to solve a pervasive problem." Id. at 1577. The second definition is the one at work here, and one specifically chosen with the knowledge of almost a decade of observing the workings of this case and the parties involved. Sank is unhappy with the administration over a number of issues that are not legally cognizable, but about which she has commenced many a successful complaint within the college's grievance system. The point of that sentence was that the proper place for Sank's complaints was in the grievance system, where she was successful, and not in the legal system where her complaints, albeit potentially valid, are not the sort that Title VII, as interpreted by the courts, was designed to prevent, correct or compensate for. The opinion did not in any manner state that Sank acted in an "unprofessional or ungentlewomanly manner," Pls.' Mem. at 3, and to construe otherwise gives a hint at the sort of misunderstandings that could have led Sank to vigorously pursue this lawsuit in the first place.

Sank also takes issue with several of the particular findings in the opinion.

[page 24]

A. <u>Denial of Academic Advising Post</u>

Sank contends that CUNY provided adjunct professors for professors who received release time for research at the same time that CUNY claimed that it could not provide an adjunct for professors who sought release time for Academic Advising. As a result, she claims that she has proven that CUNY's denial of her request for release time for time spent working in Academic Advising was a pretext. First, Sank is comparing apples and oranges. How CUNY dealt with release time for professors who sought to undertake research is not at issue, as Sank does not complain (at least in this particular allegation) that she did not receive release time for research. The only issue is how CUNY dealt with other professors involved in Academic Advising. It is undisputed that CUNY was suffering from monetary woes, and that one means of cutting corners was by reducing release time for all professors in Academic Advising. Sank was not the only professor affected by the change. Moreover, Sank presented no evidence, and continues to present no evidence, that the decision-makers who determined that Academic Advising would no longer receive the same amount of release time did so as a result of her protected actions, and that the reasons given by the administration for making the change were a pretext for retaliating against Sank.

Sank also raises the issue of Bessmer's truthfulness, stating that his purported loyalty to Harleston rendered his

[page 25]

affidavit untrustworthy. Sank has presented no admissible evidence to support such a finding, and she did not present any evidence of any such questionable truthfulness at the time of

the original motion either. It was already held, in any case, that CCNY's financial difficulties in 1992-93 caused a reduction in available release time for all faculty, and was a legitimate, non- discriminatory reason for Sank's course assignments in Spring 1993.

As a result, Sank has not met her burden pursuant to Local Rule 6.3, and her motion on this ground is denied.

B. Error in Spring 2001 Course Catalog

Similar to Sank's efforts to question the affidavit of Bessmer, she now challenges the truthfulness of the affidavit of Deputy Provost Barba by repeating the same facts that were put forward in her opposition papers and which were deemed insufficient to raise a material issue of fact.

Barba claims that he learned of the error in May and corrected it in May. A computer print-out reveals that the error was corrected on May 8, 2001. In response to this, Sank only provided her recollection that she contacted Barba later. Sank complained about the incident in May, however, and Barba noted that he learned of the error regarding Sank's classes, not that he necessarily learned of the error from her. Sank provided no other

[page 26]

admissible evidence to challenge the notion that Barba acted in a manner inconsistent with a university official performing his job as he always does.

Sank now challenges the finding that the correction was made on May 8, 2001, by claiming that such changes can be post-dated on the SIMS computer system, and that therefore the exhibit dated May 8, 2001 was post-dated. She has also offered to provide an affidavit of another university official in support of her claims. Sank should have proffered

such facts at the time of the original motion. New evidence may not be presented on a motion for reconsideration.

In short, Sank has merely re-presented evidence that was already rejected and reargued her opposition to the motion that was already denied. In addition, she has attempted to present new evidence. Such efforts are not appropriate on a Rule 6.3 motion and must result in the denial of Sank's motion.

C. Other Issues

Sank also asserts that the April 4 Order should have permitted her to amend her complaint to allege an additional twenty-three (or more) allegations of retaliation.

[page 27]

Rule 15(a) provides that the district court should freely grant leave to amend the pleadings. Fed. R. Civ. P. 15(a). The amendment should be permitted absent evidence of circumstances such as undue delay or bad faith, undue prejudice to the opposing party or futility. Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962); see also Jones v. New York State Div. of Military and Naval Affairs, 166 F.3d 45, 50 (2d Cir. 1999) (affirming district court's denial of leave to amend due to futility of amendment). It was held that the amendments should not be allowed due to evidence of undue delay and futility. April 4 Order, at 26.

Sank merely summarizes each of her allegations, without any argument as to evidence that was presented and not considered, or controlling authorities that were ignored. Given the lengthy nature of this list and the fact that Sank has failed to comply with Rule 6.3, the allegations will not be addressed separately. In any case, Sank has again failed to demonstrate that undue delay was not present when she specified for the first time twenty-three (or more) allegations

of retaliation after a bench trial had been held on the pre-November 21, 1991 events that formed the nucleus of her complaint, almost ten years after commencing this lawsuit and after CUNY had already moved twice in summary judgment against claims. Moreover, she has failed to demonstrate that such amendments would not be futile.

[page 28]

Sank does point to one specific allegation of retaliation which she claims was "never resolved" in the opinion, as well as generally points to approximately 230 pages of her declaration that was submitted in opposition to the motion. The latter will not be specifically addressed as the approximately 230 pages of her declaration were examined by this Court in determining the earlier opinion, even though the strictures of Local Rule 56.1 did not mandate that such review be made as Sank had not included any of these additional incidents in her Local Rule 56.1 statement. Because the review of the 230 pages revealed that Sank had duplicated certain specific incidents that were discussed, and on many occasions failed to provide evidentiary support for allegations or alleged actions that clearly were not adverse actions, the incidents on the 230 pages that were not specifically discussed in Sank's papers[4] were not specifically discussed in the April 4 Order and will not be discussed now. Moreover, as with all the other allegations, Sank has failed to overcome the hurdle of undue delay and futility.

The specific claim involved an alleged incident where Barba "vocally admonished and embarrassed" Sank at a Faculty Senate Meeting by accusing her of changing the date of her final exam and by his failing to apologize afterward. Again, Sank fails to

[4] Sank did not allege any of her alleged incidents in her Rule 56.1 statement. Instead, it was left to the Court to peruse an exhibit attached to her opposition memorandum in order to compile the list that was referred to in the opinion.

[page 29]

overcome the hurdle of undue delay and futility. The event in question occurred on May 17, 2001. Sank waited almost two years to specify that she considered it an act of retaliation as a result of Sank's protected actions. With regard to futility, it is not necessary to proceed beyond the first prong of the McDonnell Douglas rubric discussed above. Tomka, 66 F.3d at 1308. Sank has utterly failed to present evidence that her "embarrassment" in front of a select group of faculty and students amounted to an "adverse employment action." Gordon, 232 F.3d at 116; Quinn, 159 F.3d at 768-69. There is no indication that this public chastisement resulted in Sank's being disciplined, in Sank's receiving fewer students, in Sank's demotion, in Sank's loss of pay, or in Sank's loss of any job or position. Further, Sank has failed to present evidence that Barba's comments were causally related to Sank's protected activities.

This Court has said before that Professor Sank is a courageous, determined person. Such courage and determination, however, are likely not the best way to win friends and influence people. A lot of Sank's complaints stem from what potentially are reactions (but not adverse actions) to Sank's willingness to fight for what she believes in and to stand up for herself. Because Sank has failed to establish that arguably negative reactions to these attributes are in fact legally cognizable adverse employment actions, this Court has no choice but to dismiss this case and can only compliment Sank on her fortitude.

[page 30]

Conclusion

For the foregoing reasons, Sank's motion to amend the factual findings and conclusions of law is denied, and her motion for reconsideration of the April 4 Order is denied.

Submit judgment on notice.

It is so ordered.

New York, NY
June 19, 2003

/s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

DECIDED: June 19, 2003
CITATION: *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 10396 (S.D.N.Y. 6/19/2003)

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UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

DIANE SANK,

Plaintiff,

94 CIV 0235 (RWS)

- against -

JUDGMENT

THE CITY UNIVERSITY OF NEW YORK, JOSEPH MURPHEY, et al.,

Defendants.

----------X

Defendants having moved for summary judgment pursuant to Fed. R. Civ. P. 56 to dismiss the remaining claims in the complaint; plaintiff's opposition having been treated as a motion to amend, and the matter having come before the Honorable Robert W. Sweet, United States District Judge, and the Court, on April 4, 2003, having rendered its Opinion (88325) denying plaintiff's motion to amend, granting

defendants' motion to dismiss, and dismissing the remaining claims, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons in the Court's Opinion (88325) dated April 4, 2003, plaintiff's motion to amend is denied; defendants' motion to dismiss is granted, and the remaining claims are dismissed.

Dated: New York, New York
April 8, 2003

/stamped/ J. MICHAEL McMAHON
Clerk of the Court

BY:

/initialed/
Deputy Clerk

DECIDED: April 8. 2003

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
DIANE SANK,

Plaintiff,

- against - 94 Civ. 0253 (RWS)

THE CITY UNIVERSITY OF NEW YORK, JOSEPH MURPHEY, et al., OPINION

Defendants.
----------X

APPEARANCES:

DIANE SANK
Plaintiff Pro Se
173 Charlotte Place
Englewood Cliffs, NJ 07632

HON. ELIOT SPITZER,
Attorney General of the State of New York,
Attorney for Defendants,
120 Broadway
New York, NY, 10271
By: STEVEN L. BANKS
Assistant Attorney General
Of Counsel

[page 1]

Sweet, D.J.,

Defendants City University of New York ("CUNY") and City College of the City of New York ("CCNY") (collectively the "Defendants") have moved pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule

56.1 to dismiss the remaining claims in the complaint of plaintiff pro se Diane Sank ("Sank"). Sank's only remaining claims, for which she has requested a jury trial, are filed pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), codified at 42 U.S.C. §§ 2000e et seq., alleging certain acts of retaliation taken against Sank after she filed a complaint of discrimination with the New York City Human Rights Commission and occurring after November 21, 1991, the effective date of the 1991 amendment to the Civil Rights Act.[1] In addition, Sank's opposition will be treated, in part, as a motion pursuant to Rule 15(a) of the Federal Rules of Civil Procedure to amend her complaint to include approximately twenty-three additional acts of purported retaliation that occurred from late November 1991 to March 1995.

[1] A bench trial has already been held on Sank's claims arising prior to November 21, 1991. Permission was granted at the close of the bench trial for the Defendants to file the instant motion because Sank did not specifically raise the claims that are the subject of the instant motion until May 2002, well after the Defendants had moved for summary judgment for the first time. Before putting the judiciary and the parties to the expense of the jury trial, it was determined that the claims should first be tested in a summary judgment motion if the Defendants so chose.

[page 2]

For the following reasons, Sank's motion to amend is denied, and the Defendants' motion is granted. As a result, all of Sank's remaining claims are dismissed.

Prior Proceedings

On October 21, 1988, Sank filed a charge of discrimination, numbered "EM00457-8/24/88-DE" with the New York City Commission on Human Rights ("NYCCHR"), alleging that Bernard Harleston ("Harleston"), President of the City College of the City University of New York ("CCNY"), removed Sank as chairperson of the Anthropology Department on April 27, 1988 because of gender discrimination. Sank, a white female, has been employed as a full professor of anthropology at CCNY since 1968.

Sank amended her charge on June 27, 1989, to add a claim that her removal as chairperson was a result of racial discrimination.

On August 8, 1989, Sank filed a second amended charge with the NYCCHR alleging that CCNY had retaliated against her for her charge of discrimination by (1) denying her request for sabbatical leave and (2) removing the contents of her research laboratory without proper notice to her.

[page 3]

Sank filed a third amended charge on March 3, 1990, alleging that the chairperson of the Anthropology Department had threatened, in September 1989, to remove her research computer in retaliation for her charge of discrimination.

The NYCCHR issued a seventeen-page Determination and Order After Investigation on January 22, 1993. The determination concluded that there was no probable cause to believe that CUNY or its employees had engaged in the unlawful discriminatory and retaliatory conduct alleged in Sank's charge.[2] The Equal Employment Opportunity Commission adopted the conclusions of the NYCCHR and issued Sank a Right-to-Sue letter on October 19, 1993.

Sank filed her complaint in this Court on January 18, 1994, and an amended complaint (the "Complaint") was filed on May 27, 1994. After several iterations of motion practice, Sank's complaint was winnowed down to certain claims of discrimination and retaliation in violation of Title VII. See Sank v. City University of New York, 219 F. Supp.2d 497 (S.D.N.Y. 2002). For those actions

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[2] Sank claims that a determination of "probable cause" was found but fails to point to any such determination in her exhibits. The determination attached as an exhibit to the Defendants' declaration states that no probable cause was found. See Determination of January 23, 1993 at 1 ("After investigation, the Law Enforcement Bureau ("Bureau") of the Commission has determined that there is no probable cause to believe that respondents engaged in the unlawful discriminatory practices charged in the complaint

and amended complaints."); id. at 11 ("[N]o evidence was uncovered to support [Sank]'s allegation that she was removed as chairperson of the Anthropology Department because her sex, race and color."); id. at 12-16 (discussing and finding no evidence to support Sank's claims of retaliation).

[page 4]

alleged to have occurred prior to November 21, 1991, the effective date of the 1991 amendment to the Civil Rights Act providing the right to a jury trial for Title VII plaintiffs, a six-day bench trial was held. At the conclusion of the trial on October 7, 2002, an opinion was issued from the bench, concluding that there was insufficient evidence to support Sank's discrimination and retaliation claims arising from her removal as department chairperson, the relocation of her laboratory, and the denial of her request for sabbatical leave. Sank has filed a motion to reconsider these findings, which is presently returnable on April 16, 2003.

Thus, the only remaining claims in this action are Sank's allegations of retaliatory actions occurring after November 21, 1991, and for which she is entitled a jury trial. Two specific claims were made part of this action through a motion for reconsideration Sank filed in May 2002. Sank v. CUNY, 94 Civ. 253, 2002 U.S. Dist. LEXIS 14032, at *17-18 (S.D.N.Y. July 31, 2002). In her motion for reconsideration, for the first time Sank specifically alleged that CUNY retaliated against her by (1) denying her request to participate in Academic Advising in lieu of teaching a course in the Spring 1993 semester, and (2) failing to correct an error in the CCNY Fall 2001 Schedule or Classes that listed prerequisites for the course that were not, in fact, required.[3] In her instant

[3] Related to this claim is Sank's assertion that the mis-described class was precipitously cancelled due to under-enrollment in August 2001.

[page 5]

papers, Sank has submitted an additional twenty or so allegations of retaliatory conduct, which shall be discussed, infra.

The Defendants filed the instant motion on December 4, 2002, and Sank responded on February 5, 2003. The Defendants submitted their reply on March 19, 2003, at which time the motion was considered fully submitted.

Facts

As befits a summary judgment motion, the following facts are drawn from the parties' Rule 56.1 statements. It should be noted that Sank, who received prior notice that she would be required to reply to CUNY's Rule 56.1 statement, failed to supply adequate evidentiary support for most of her assertions in her Rule 56.1 statement in response to the Defendants' Rule 56.1 statement. Where Sank did not provide a specific reference to an exhibit or other piece of admissible evidence, her assertions were discounted, except where her assertions could be supported by the documents relied upon by the Defendants in the paragraphs with which Sank took issue. E.g., Millus v. D'Angelo, 224 F.3d 137, 138 (2d Cir. 2000) (per curiam) (affirming summary judgment where plaintiff failed to deny key allegations in defendant's Local Rule 56.1 statement). Because Sank was served with proper notice of the local rule, consisting of a separate, two-page notice, her pro se status does not insulate her from this result. E.g., Champion v.

[page 6]

Artuz, 76 F.3d 483, 486 (2d Cir. 1996) (affirming summary judgment against pro se plaintiff who was provided with notice of Local Rule 56.1 requirements, but nonetheless failed to comply with rule).

Sank's Course Assignments in Spring 1993

At a meeting of the Anthropology Department on September 17, 1992, Professor Fremont Besmer ("Besmer") was elected to serve as acting chairperson. An election was necessary because Professor Carol Laderman ("Laderman"), the sitting department chairperson, was unable to perform the duties of the office following a stroke in August 1992.

As acting chairperson, Besmer was responsible for preparing the Spring 1993 teaching schedules for faculty in the Anthropology Department. In conjunction with that responsibility, he received a memorandum from Sank dated September 24, 1992, in which Sank requested that she be assigned in the Spring 1993 to teach two courses, ANTH 290 D and ANTH 101 E. In addition, she asked that she be assigned to Academic Advising or, if she could not get that assignment, that she be assigned to ANTH 101 F.[4]

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[4] Sank claims without citing any evidentiary support that up until the Spring of 1993, she received an assignment to Academic Advising as a pro forma matter. It is true that in the October 2, 1992 memorandum authored by Sank and cited by the Defendants, Sank claims to have been a part of the program for "10+ years." The Court will accept the fact that Sank had formerly received the assignment for more than ten years as an uncontested fact, but not the fact that she had received that position as a matter of course for all of that time. For the basis of this motion only, however, such inference can be drawn from that fact that she had consistently received the assignment for more than ten years.

[page 7]

Prior to this time, Sank had consistently received an Academic Advising assignment for more than ten years.

Academic Advising is an academic support program in which faculty members at CCNY can participate with the approval of their department chairperson, on the condition that their participation does not interfere with their primary responsibility to teach. Until the 1992-93 academic year, faculty members participating in Academic Advising received credit towards their teaching obligation for each semester that they participated in the program. In the 1992-93 academic year, because of a financial exigency, CCNY reduced by half the credit granted for participation in Academic Advising, i.e., a faculty member would have to participate in Academic Advising for two semesters in a single academic year to receive a one-course reduction in his or her obligation. This change in policy affected all faculty in all academic departments.[5]

In a memorandum to Besmer dated October 2, 1992, Sank reiterated her request to be assigned to ANTH 290 D, ANTH 101 E and

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[5] Sank does not contest this assertion, but does allege that only two or three faculty were involved in Academic Advising and thus Sank, as one of them, bore the brunt of the change in policy. Sank does not provide any evidentiary support for this assertion, which, in any case, does not present a genuine issue of fact with regard to whether the change affected all professors in the program instead of only Sank.

[page 8]

to Academic Advising, or, if Academic Advising were unavailable, to be assigned to ANTH 101 F as her third course.

Besmer scheduled Sank to teach ANTH 290 D, ANTH 101 E and ANTH 101 F in the Spring Semester. The Defendants claim that Besmer could not approve Sank's request to participate in Academic Advising in lieu of teaching ANTH 101 F because (1) there was insufficient funding to hire adjunct faculty to cover ANTH 101 F, and (2) CCNY's change in policy reducing available release time for faculty members who participated in Academic Advising meant that Sank would have had to teach a third course regardless of whether or not she participated in Academic Advising. Sank states that she was unaware of the change of policy at that time.[6]

The Defendants allege that Sank's discrimination charges with the NYCCHR and her grievance challenging Besmer's election as acting chairperson did not affect the teaching schedule Sank received for the Spring 1993 semester.[7]

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[6] Sank also questions the timing of the administration's budget short fall and decision to change the Academic Advising policy. Sank has not supported her speculations with any evidence and as such has failed to raise a genuine issue of fact in this regard.

In response, Sank points to her "replies" to declarations of two witnesses or the defendants: Besmer and Ilona Anderson ("Anderson"), the former CCNY Dean for Faculty Relations. She does not point to any specific ebuttal in these replies, which are primarily based on speculation and vithout any evidentiary support. A review of these replies does not reveal vhat material issue of fact Sank was trying to raise, except perhaps to ssert that Besmer was aware of Sank's actions at the time he made the ecision regarding her course load. Whether such fact, if true, would uggest retaliation is a matter of law, which as discussed later, is nsufficient to avoid summary judgment on the issue of pretext.

[page 9]

In January 1993, at the start of the Spring 1993 emester, Laderman resumed her duties as chairperson of the Anthropology Department. Laderman approved Sank's equest to participate in Academic Advising in the Spring 1993 semester. In a letter dated February 11, 1993, Ilona Anderson, then the CCNY Dean for Faculty Relations ("Anderson"), notified Sank that she was not entitled to additional release time for her participation in the advising program.

In a letter dated March 1, 1993, Sank told Anderson that her assignment to Academic Advising for Spring 1993 had resulted in a contractual overload, i.e., an assignment to more than 21 credit hours in a single academic year. On March 29, 1993, Sank filed a formal grievance alleging a contractual overload and requesting "[p]ayment for excess workload."

On April 16, 1993, Anderson met with Sank, Laderman and Sank's union representative, Professor Al Bachman. At that meeting, Sank agreed to resign from Academic Advising and withdraw her grievance in exchange for additional compensation for the fifteen hours she had worked in Academic Advising in Spring 1993.[8]

[8] Sank disputes this fact by referring generally to her "reply" to Anderson's declaration. A review of that document, which as discussed above is largely based on personal knowledge or speculation without any evidentiary support, does not reveal the basis of her dispute.

[page 10]

During the discussions to resolve Sank's grievance, her previous charges of discrimination were not mentioned or otherwise discussed.[9] Anderson did not consider Sank's discrimination claims in working to resolve Sank's grievance.

As part of an agreement to resolve Sank's grievance, she received additional compensation for the time she worked in Academic Advising in Spring 1993.

The Error in the Fall 2001 Schedule of Classes

The Provost's Office at CCNY is responsible for preparing and publishing class schedules and course catalogs for use by the college community. The process involved in preparing a schedule of classes takes several months to complete and requires the participation of the Registrar's office, deans and department chairpersons.

The Provost's office requests from the deans a schedule of classes to be offered by their respective divisions in the following semester. In turn, the deans request from each chairperson a schedule of classes to be taught by his or her academic department. In response, the department chairpersons develop preliminary class schedules, identifying which courses will be

[9] Sank's union contract did not permit faculty to assert grievances based on discrimination claims filed outside of the CUNY process.

[page 11]

taught, the number of sections to be taught, meeting time and assigned faculty. The preliminary class schedules do not list prerequisites.

The Provost's office transmits the class schedules received from the academic departments to the Registrar's office, which codes the schedule into the Student Information Management System ("SIMS") and prepares a revised schedule of classes for the entire college. The revised schedule

lists for each course any prerequisites or co-requisites obtained from the SIMS database maintained by the Registrar's office. The revised schedule of classes is intended to, as much as possible, match the final schedule of classes supplied to students.

When completed, the Provost's office sends a copy of the schedule of classes to the deans and departmental chairpersons for their review and approval. Thereafter, the Registrar's office makes final corrections to the schedule of classes, which is then submitted to a commercial printer to be published in booklet format. After the final schedule of classes is printed and delivered to campus, it is distributed to students prior to the start of registration.

Mistakes are discovered every year in the printed schedule of classes following its publication and distribution. When an error is reported and verified by the Provost's office in

[page 12]

a printed schedule of classes, a correction is made in the SIMS database maintained by the Registrar's office, a correction is posted in the Registrar's office, and the schedule of classes posted on the college website is updated to include the correct information. Given the frequency of errors in the printed schedule of classes, students are generally aware that the schedule of classes may be updated and corrected after its publication, and that they should check with the Registrar's office or the college website for the latest course information.[10]

For the Fall 2001 Schedule of Classes, the revised schedule of classes was sent to deans and departmental chairpersons in March 2001[11] and sent to the printer in April 2001.

In May 2001, it was brought to the attention of Deputy Provost Joseph Barba ("Barba") that the Fall 2001 Schedule of

Classes erroneously listed a mathematics prerequisite for one of

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[10] Sank speculates that students were not aware that they should look to these sources for potential errors. She fails to provide specific, admissible evidentiary support for this belief.

[11] Sank contests that this procedure could not have been followed in the spring of 2001 based on her belief that if her departmental chair had received the draft, the mistake would have been corrected. Such supposition is insufficient to raise a genuine issue of material fact. She also recites the hearsay statement from her chairperson, who denied having received the list. The hearsay statement is not admissible and cannot raise a genuine issue of fact.

[page 13]

Sank's courses, ANTH 29500.[12] The Course Catalog listed the following comments under ANTH 29500:

> PREREQ: Math 10100 or MATH 10700 or MATH 10500 CREDIT NOT GIVEN FOR BOTH ECO 29500 AND MATH 17300

Barba verified the error and determined that the mathematics prerequisite for ECO 29500, an economics course, had erroneously been listed under ANTH 29500.[13] The Defendants hypothesize that the erroneous listing occurred due to an input error by temporary clerical staff in Spring 2000 when CCNY was upgrading the SIMS database. In Fall 2000 and Spring 2001, numerous courses in the SIMS database were discovered to have erroneously listed prerequisites. The input error for ANTH 29500 was not discovered prior to the printing of the Fall 2001 course catalog because that was the first semester that the course had been offered following the upgrade.

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[12] The Defendants claim that Sank contacted Barba directly; Sank claims she did not know that Barba was the person in charge of overseeing such changes and so would not know to contact him. The fact that changes were made in May 2001, however, shows that Barba was contacted in some manner, even if not by Sank directly. Therefore, the fact that Sank did not

know Barba was in charge of the correction process does not raise a genuine issue of fact as to whether he was contacted in May 2001

[13] Sank again speculatively posits why such mistake could not have been made, including the fact that the Economics courses are listed many categories away from the Anthology courses and the fact that the Economics courses should be listed by numbers without two zeros on the end, i.e., ECO 295, and so the mistake should not have been made. These speculations are only that and are insufficient to raise a genuine issue of fact.

[page 14]

Barba then directed Virginia Barberesi in the Registrar's office to remove the mathematics prerequisite from the course in the SIMS database so that students would be permitted to register for ANTH 29500. In addition, he had CCNY's website updated so that ANTH 29500 was correctly described as having no prerequisites. A correction was also posted in the Registrar's office. This procedure was completed by May 8, 2001,[14] before the start of registration on May 14, 2001. Registration for the fall semester continued through the end of August 2001.

At the time Barba dealt with the error, he had no knowledge of Sank's charges of discrimination or the existence of this litigation.[15] His response was identical to his response to

[14] The document on which the Defendants rely to show that the change was made reveals that the prerequisite of taking one of three mathematics courses was deleted from the listing. Sank claims that the administration failed to delete all the prerequisites and that some remained in place after this action. She does not provide any evidentiary support for this assertion and therefore does not establish a genuine issue of material fact in this regard. Indeed, the page from the course catalog that she includes as an exhibit vitiates her argument: the catalog lists as a prerequisite that a student have taken one of three mathematics courses (the three that were deleted on May 8, 2001 according to the administration's printout) and then states that a student who has taken MATH 17300 cannot get credit for taking ECO 29500, or vice versa. That statement does not establish a prerequisite but states a condition of taking ECO 29500, that one may not also get credit for MATH 17300. The

latter line supports Barba's conclusion that the prerequisites for ECO 29500 were mistakenly appended to ANTH 29500.

[15] Sank states that she "doubts" that Barba had no knowledge of her complaints because as an administrator, he should have been privy to the knowledge. Such speculation in the absence of any evidentiary support does not create a genuine issue of material fact.

[page 15]

other complaints of erroneously listed prerequisites in the schedule of classes.

By letter dated May 23, 2001 (after the problem was corrected), Sank informed CCNY President Stanford A. Roman Jr. of the error in the printed catalog and asked for a complete investigation thereof. On September 4, 2001, she filed a grievance related to the error, in addition to other concerns.

CCNY requires elective courses, such as ANTH 29500, to have a minimum enrollment of ten students. ANTH 29500 was cancelled for the Fall 2001 semester on August 22, 2001, one day prior to the close of regular registration, at which time the class had three students enrolled. On August 22, 2001, two other anthropology courses -- ANTH 24600 and ANTH 24900 -- had enrollments of seven and five students, respectively. The Dean of Social Sciences, in consultation with the Anthropology Department chairperson, decided to permit these courses to remain open in anticipation that they would enroll a minimum of ten students.

By the end of late registration on August 30, 2001, ANTH 24600 had eleven students registered and ANTH 24900 had nine students registered. Subsequently, in September 2001, two additional students registered in ANTH 24900, bringing its total enrollment to eleven students.

[page 16]

Sank's salary was unaffected by the cancellation of ANTH 29500. Sank contends that she was adversely affected, however, because (1) she was told four days before the fall

semester that the class was cancelled, so that she had already substantially completed her preparation for the class; (2) she was forced to teach an additional class that was outside the field of Anthropology and that she had never before taught in order to make up for the cancelled class in the Spring 2002; (3) the fact of cancellation was put in her folder as an "adverse/negative" teaching record; and (4) the cancellation was disincentive for students to enroll in ANTH 29500 when next it was offered.

Sank's Other Allegations of Retaliatory Conduct

For the first time in her opposition papers, Sank has specified a series of actions that she claims were retaliatory and that occurred after November 21, 1991. These allegations were not part of her Rule 56.1 statement.[16] In light of the length and breadth of these charges, they will be summarized below as they appear in an exhibit to Sank's opposition papers. It should also be noted that the "date" of the action is often times demarcated by the date on which Sank responded to the alleged adverse action, such as by writing letters or filing grievances.

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[16] Sank did refer to specific exhibits to provide an evidentiary basis for her claims. The organization of the exhibits was such, however, that it was necessary at times to leaf through numerous documents before reaching the one to which Sank apparently referred.

[page 17]

Date	Alleged Adverse Action
11/91	Received memoranda dated prior to Nov. 21, 1991[17] telling Sank to attend meeting with Dean of Social Science to substantiate Sank's need for space in research lab.
11/26/91	Harleston promised Sank opportunity to watch videotape of interview with reporter and never followed up on that promise.

12/91 Sank filed grievance with regard to refusal to assign Sank to Academic Advising in the 1992-93 school year.

12/27/91 Harleston threatened to eliminate faculty and department.

1/22/92 Sank assigned to student advising during January intercession after she had already served once.[18]

06/18/92 Requested assignment to Academic Advising in Spring 1993 and request was denied. 09/07/92 Sank filed grievance with CCNY administration regarding illegal department election.

09/24/93 Sank was assigned four courses in Spring 1993 after she had served three courses and one Academic Advising in Fall 1992.

10/02/92 Sank wrote letter protesting that Besmer changed her elective for spring 1993 semester from 29000 to 29500; could cause loss of 29000 course (although apparently it did not so result).

10/08/92 Sank filed grievance against Besmer for conducting illegal department meeting on Sept. 3, 1992 and Sept. 17, 1992.

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[17] Sank claims to have received the memoranda after November 21, 1991.

[18] As evidence for this "action," Sank cites only to a FOIL request seeking information in preparation for "A Grievance Concerning Faculty Required to Serve as Advisors to Students During Winter Intercession." The document does not make clear that Sank alone suffered this hardship.

10/19/92 Sank wrote to NYCCHR seeking to append grievances regarding continued harassment by Besmer and illegal elections; NYCCHR did not contact CUNY regarding claims.[19]

10/19/92 Sank wrote Besmer protesting not being assigned Academic Advising for Spring 1993 semester.

12/17/92 &
02/11/93 Sank sought Step I grievance and was informed of new rule regarding half-credit for Academic Advising.

03/01/93 Sank filed grievance for being assigned to a yearly total of 24 hours that exceeded 21-hour limit.

04/07/93 &
03/15/93 Sank wrote letter to Laderman protesting her telling Sank that the head of Academic Advising was not satisfied with Sank's work when he had told Sank he was satisfied with her work.

11/93 Sank requested she receive credit for three courses for two courses that had a total enrollment of 95 students; that request was denied.

03/15/94 Sank filed grievance about not receiving credit for extra courseload as discussed above.

06/23/94 Sank sought union to join in her grievance filed on March 15, 1994 and the union said no. 12/08/93 Sank offered to be on Space Committee to CCNY president and no one ever responded to letter.

01/20/94 &
02/04/94 Sank received memo stating her grades had not been received in timely manner; Sank replied with her reason for being late and noted that she got her

grades in on Jan. 20, prior to the letter being written on Jan. 21, 1994.

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[19] This allegation appears to be alleged as against NYCCHR, as it is not clear how the Defendants were supposed to be liable for the NYCCHR's purported inaction.

[page 19]

04/07/94 Sank sought assignment to Academic Advising and was denied.

11/20/94 &
03/27/95 Sank filed grievance because Laderman refused to allow Sank, a physical anthropologist, to replace physical anthropologist on department's executive committee and Laderman changed bylaws purportedly illegally to avoid having Sank on committee.

Although listed separately, these allegations may be broken into twelve general allegations: (1) Sank had to substantiate her need for laboratory space (11/91); (2) Sank was not permitted to listen to an interview tape (11/26/91); (3) Sank first was not assigned to Academic Advising in the Spring of 1993 and, once she was, she had a contractual overload of courses (12/91; 06/18/92; 09/24/93; 10/19;92; 12/17/92; 02/11/93; 03/01/93); (4) Harleston threatened to eliminate faculty positions due to budget constraints (12/27/91); (5) An illegal department election was held (09/07/92; 10/08/92; 10/19/92); (6) Sank was assigned to ANTH 29000 instead of ANTH 29500 (10/02/92); (7) Sank was told that her work in Academic Advising was unsatisfactory when she had previously been told that it was satisfactory (04/07/93; 03/15/93); (8) Sank received two credits for two classes with a total of 95 students although she requested to receive three credits (11/93; 03/15/94; 06/23/94); (9) No one responded to Sank's offer to be on CCNY's Space Committee (12/08/93); (10) Sank was told that her grades were not received on time (01/20/94; 02/04/94); (11) Sank was

again denied an Academic Advising assignment (04/07/94); and (12) The departmental bylaws were changed purportedly to keep Sank

[page 20]

from joining the department's Executive Committee (11/20/94; 03/27/95).

Because the instant motion deals with Sank's request to be assigned to Academic Advising in the Spring of 1993, she has actually only sought to amend her complaint to add 11 new claims of retaliation.

DISCUSSION

I. Standard of Review

Rule 56(e) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits . . . show that there is no genuine issue as to material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Silver v. City Univ., 947 F.2d 1021, 1022 (2d Cir. 1991). "The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish her right to judgment as a matter of law." Rodriguez v. City of New York, 72 F.3d 1051, 1060-61 (2d Cir. 1995). In determining whether a genuine issue of material fact exists, a court must resolve all ambiguities and draw all reasonable

[page 21]

inferences against the moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Gibbs-Alfano v. Burton, 281 F.3d 12, 18 (2d Cir. 2002).

"The salutory purposes of summary judgment -- avoiding protracted, expensive and harassing trials -- apply no less to discrimination cases than to commercial or other areas

of litigation." Nicastro v. Runyon, 60 F. Supp.2d 181, 183 (S.D.N.Y. 1999) (citing Dister v. Continental Group, Inc., 859 F.2d 1108, 1114 (2d Cir. 1988)). Greater caution must be exercised, however, in granting summary judgment in employment discrimination cases where the employer's intent is genuinely in issue. Belfi v. Predergast, 191 F.3d 129, 135 (2d Cir. 1999). This is so because "[e]mployers are rarely so cooperative as to include a notation in the personnel file that the [action complained of] is for a reason expressly forbidden by law." Bickerstaff v. Vassar College, 196 F.3d 435, 448 (internal quotation marks and citation omitted; brackets in the original). But even where an employer's intent is at issue, "a plaintiff must provide more than conclusory allegations of discrimination to defeat a motion for summary judgment." Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997); Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir. 1985).

In addressing the present motion, the Court is mindful that the plaintiff is proceeding pro se and that her submissions should be held "'to less stringent standards than formal pleadings

[page 22]

drafted by lawyers . . . .'" Hughes v. Rowe, 449 U.S. 5, 9, 101 S.Ct. 173, 176 (1980) (per curiam) (quoting Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 595 (1972)); see also Ferran v. Town of Nassau, 11 F.3d 21, 22 (2d Cir. 1993). The pleadings of a pro se plaintiff should be read "liberally" and interpreted "to raise the strongest arguments they suggest.'" McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999) (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994)). Nevertheless, the Court is also aware that pro se status "'does not exempt a party from compliance with relevant rules of procedural and substantive law." Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983) (quotations omitted).

II. Law of the Case Does Not Prohibit This Motion

Sank first argues that the "law of the case" should bar the Defendants from bringing this motion.

The law of the case doctrine "'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" Arizona v. California, 460 U.S. 605, 618 (1983). Application of this doctrine is discretionary "and does not limit a court's power to reconsider its own decisions prior to final judgment." In re Crysen/Montenay Energy Co., 226 F.3d 160, 165 n.5 (2d Cir. 2000), cert. denied, 532 U.S. 920 (2001) (quoting Sagendorf-Teal v. Co. of Rensselaer, 100 F.3d 270, 277 (2d Cir. 1996)). See Aramony v.

[page 23]

United Way of Am., 254 F.3d 403, 410-11 (2d Cir. 2001) (rejecting law of the case argument because the court had not yet decided the issue and in any event the doctrine is discretionary).

The issue of whether the Defendants are entitled to summary judgment on the retaliation claims arising from Sank's course assignments in Spring 1993, the Defendants' response to the error in the Fall 2001 Schedule of Classes and the other, newly specified claims discussed above has not yet been decided. The Defendants' previous motion for summary judgment, dated April 13, 2001, addressed only those claims raised in Sank's NYCCHR charge and in the Amended Complaint. Indeed, Sank did not specify the two particular actions regarding her course assignments and the error in the schedule of classes until she moved for reconsideration in May 2002.[20]

On September 26, 2002, the Court denied the Defendants' motion that had sought dismissal of the retaliation claims on jurisdictional grounds.[21] Transcript at 3. The Court did not, however, decide the Defendants' entitlement to summary judgment based on the two specified remaining claims. In addition, because

[20] As noted by the Defendants, the Fall 2001 course catalog had not even been published at the time they filed their original summary judgment motion.

[21] The Defendants argued that the actions alleged by Sank in her motion for reconsideration were not reasonably related to those in her charge of discrimination and thus they should be dismissed from the action.

[page 24]

the Defendants were specifically invited to make the instant motion, this Court will in any case exercise its discretion to hear the motion. As a result, Sank's argument to deny the claim based on the "law of the case" doctrine is denied.

A response is necessary, however, to Sank's assertion that the Defendants are somehow trying unfairly to take away her right to a jury trial, which attaches to any of her claims that occurred after the effective date of the 1991 Civil Rights Act. Sank only has a "right" to a jury trial if her claims of retaliation occurring after November 21, 1991 are viable. The Defendants also have a right to attempt to show that her claims are not viable, i.e. that they will not survive a motion for summary judgment, before being forced to submit to a jury trial and its concomitant costs. Indeed, it would be a waste of judicial resources if all claims were allowed to go to trial without first being tested by summary judgment. Therefore, the Defendants are merely exercising their right to attempt to show that Sank's claims are not viable and that a trial is therefore not necessary. The Defendants presumably would have done so almost two years ago in their original summary judgment motion if Sank had clarified that her allegations of retaliatory actions had extended beyond those listed in her charge and amended complaint.

[page 25]

III. Sank's Claims of Retaliation

The Defendants first argue that Sank should not be permitted to include her newly specified claims of retaliation in her complaint and next argue that the previously identified claims fail because Sank has failed to present a material issue

of fact showing a causal connection between the action and the protected activity and showing that the Defendants' legitimate, non-discriminatory reasons were pretextual.

A. New Claims

Sank has alleged approximately 23 "new" acts of retaliation. Of those, at least seven of the alleged acts are interrelated with the previously established claim of Sank's complaints about her Spring 1993 course schedule and will be incorporated in the discussion of that claim.[22] Sank's inclusion of the other acts will be treated as a motion to amend her complaint to include those acts and analyzed under the rubric of Rule 15(a) of the Federal Rules of Civil Procedure.

Rule 15(a) provides that the district court should freely grant leave to amend the pleadings. Fed. R. Civ. P. 15(a). The amendment should be permitted absent evidence of circumstances such

[22] These are the actions complained of that occurred on June 18, 1992; September 24, 1993; October 2, 1992; October 19, 1992; Dec. 17, 1992 and Feb. 11, 1993; March 1, 1993; and March 15, 1994.

[page 26]

as undue delay or bad faith, undue prejudice to the opposing party or futility. Foman v. Davis, 371 U.S. 178, 182 (1962); see also Jones v. New York State Div. of Military and Naval Affairs, 166 F.3d 45, 50 (2d Cir. 1999) (affirming district court's denial of leave to amend due to futility of amendment). Present here is evidence both of undue delay and of futility.

First, Sank's allegations start with actions occurring right around November 21, 1991 and end with an action on March 27, 1995. Thus, Sank is now attempting to amend her complaint to add for the first time actions that occurred from eight to more than eleven years ago. Moreover, she is doing so after the Defendants have already filed two motions for summary judgment and after a bench trial has already been

held on claims occurring prior to November 21, 1991. This is classic case of undue delay. Sank should have raised each of these allegations in her motion to reconsider this Court's decision holding that Sank did not have a right to a jury trial. Thus, the Defendants would have had the opportunity to respond to them in this summary judgment motion. Instead, if the allegations were to be admitted, the Defendants would certainly have to have the opportunity to file a third motion for summary judgment against the new claims.[23] In addition, the

[23] It is true that the Defendants had the opportunity to reply to these allegations in their reply memorandum. It was unnecessary for them to conduct the necessary investigation, research and presentation of the facts, however, if their current argument succeeds that the allegations should not be added to the Complaint. Therefore, they have not had a proper opportunity to respond to the allegations.

[page 27]

fact that Sank's list of actions stops at 1995 raises the spectre that when next the Defendants file a summary judgment motion, Sank will append in opposition yet another list of alleged retaliatory actions running from 1995 to whatever the filing date of those papers are. As noted in earlier opinions, it is time for this case to come to a halt. Sank has been given every opportunity to make her case. Her pro se status will only excuse so much; raising claims for the first time eight to eleven years after they occurred -- and at extremely opportune timing in order to preserve her claim -- is not a thing to be easily excused.

In any case, the claims are futile. A Title VII retaliation claim is analyzed under the rubric of McDonnell Douglas. Tomka v. Seiler Corp., 66 F.3d 1295, 1308 (2d Cir. 1995). First, in order to make out a prima facie case of retaliation, a plaintiff must establish that (1) she engaged in protected activity; (2) defendants were aware of the activity; (3) she was subjected to an adverse employment action; and (4) there is a causal connection between the protected activity and the adverse employment action. Gordon v. New York City

Bd. of Ed., 232 F.3d 111, 116 (2d Cir. 2000); Quinn v. Green Tea Credit Corp., 159 F.3d 759, 768-69 (2d Cir. 1998). The Second Circuit has held that a close temporal relationship between the protected activity and an employer's adverse actions can be sufficient to establish causation. Treglia v. Town of Manlius, 313 F.3d 713, 720 (2d Cir. 2002) (citing Cifra v. General Elec. Co., 252 F.3d 205, 217 (2d Cir.

[page 28]

1998) ("The causal connection needed for proof of a retaliation claim can be establish indirectly by showing that the protected activity was closely followed in time by the adverse action.") (internal quotation marks omitted)). For mere temporal proximity to establish causality, the intervening period must be "very close." Clark Co. Sch. Dist. v. Breeden, 532 U.S. 268, 273, 149 L. Ed.2d 509, 121 S. Ct. 1508 (2001).

If the plaintiff establishes a prima facie case of retaliation, the defendant may articulate a legitimate, non-retaliatory reason for its actions. Id. at 768. Finally, if the defendant does so, the plaintiff must prove that the proffered reason is merely a pretext for retaliation. Id. at 769.

As an initial matter, the majority of Sank's newly alleged claims are not even adverse employment actions. For instance, she cites to several memoranda telling her to attend a meeting about Sank's need for laboratory space, to the fact that the union would not join her in one of the many grievances against CUNY documented in her papers and even to the fact that the NYCCHR apparently never responded to one of her allegations. These are not adverse actions.[24] The only claims that could be potentially

[24] To sustain an adverse employment action, a plaintiff must "endure[] a 'materially adverse change' in the terms and conditions of employment.'" Galabya v. New York City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000). In order for the action to be "'materially adverse,' a change in working conditions must be 'more disruptive than a mere inconvenience or an alteration of job responsibilities.'" Id. (quoting Crady v. Liberty Nat'l Bank and Trust Co. of Indiana, 993 F.2d 132, 136 (7th Cir. 1993)). A

"'material adverse change' is one that 'has an attendant negative result, a deprivation of a position or an opportunity.'" Campbell v. Grayline Air Shuttle, Inc., 930 F. Supp. 794, 802 (E.D.N.Y. 1996) (citing Medwid v. Baker, 752 F. Supp. 125, 136-37 (S.D.N.Y. 1990)). While adverse employment actions extend beyond readily quantifiable losses, "not everything that makes an employee unhappy is an actionable adverse action." Phillips v. Bowen, 278 F.3d 103, 117 (2d Cir. 2002) (stating that employee's "trivial complaints about an unpleasant working environment" do not constitute adverse employment actions).

[page 29]

considered "adverse actions" are: (1) the denial of Sank's request in November 1993 to receive three credits for teaching two courses with a total enrollment of 95 students; (2) the fact that Sank was again denied an assignment to Academic Advising after her request in April 1994; and (3) purported maneuvering by the Anthropology Department and Chairperson to avoid Sank's secession to the department's executive committee in March 1995.

With regard to her claim that she should have received three credits for two classes with a total enrollment of 95 students, Sank was informed that the general rule is that an enrollment of 80 or more students is required for a class to qualify for two credits. Memorandum from Dean Jeffrey Rosen, at 1 (Nov. 16, 1993). The action occurred years after Sank filed her latest charge of discrimination and therefore Sank cannot establish a causal connection by temporal proximity. Further, she has not provided any direct evidence of retaliation. Therefore, this claim would fail at the outset as Sank has not made her prima facie case. In any case, Sank has not presented any evidence that others who were similarly situated were treated differently when they taught

[page 30]

a class of less than 80 students and sought to receive two credits for it. It is noteworthy that, on May 5, 1994, the union declined to join Sank in a grievance, which she had filed regarding this allegation on March 15, 1994. It thus appears that Sank will be unable to meet her eventual burden of proving pretext.

The second claim is that Sank was again denied an Academic Advising position for the Spring of 1995. On April 7, 1994, Sank requested that she be assigned to ANTH 285D, ANTH 101E and ANTH 101F. She noted in a footnote, however, that she again was requesting that she serve in Academic Advising instead of teaching ANTH 101F. In light of the determination, infra, with regard to Sank's other claim based on her not being assigned to Academic Advising, this claim also appears futile.

The final claim is that the Anthropology Department, through the actions of its chairperson, changed its bylaws in order to avoid having Sank on its executive committee.*fn25 Sank filed a grievance regarding this issue. In a letter dated March 27, 1995,

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[25] In a grievance dated November 20, 1994, Sank asserts that the Department of Anthropology had, since its inception until the actions complained of, functioned with by-laws that stipulated that at least one faculty member from each of the four fields of Anthropology (archeology, cultural, linguistics and physical anthropology) had to be represented on the department's executive committee. On September 1, 1994, it was announced that it was against the university's by-laws to require departments to have the members of its executive committee representing the different fields in that department. The chairperson requested a vote eliminating that rule in the bylaws. Sank challenges her motive for seeking that vote and the way in which the vote was held.

[page 31]

the union again refused to join Sank in this grievance. The union representative wrote:

> [T]he issues you have raised do not constitute a violation of the PSC/CUNY agreement or any rules or regulations as promulgated by the CUNY Board of Trustees including the bylaws. As I have previously written you ..., in making any claim of discrimination under Article VIII of the contract the burden of proof in making such a claim rests solely on the Union and we

> must provide evidence and testimony to support such a claim. We have no such objective proof that the actions taken by [the department chairperson] were discriminatory against you.

Letter from Professional Staff Congress of CUNY, at 1 (March 27, 1995). In a letter dated April 10, 1995, Anderson, dean of faculty relations, included a summary of discussions held regarding Sank's complaint. These discussions appeared to be held to seek a good faith solution to Sank's complaints. There is no temporal proximity between the vote complained of and the Sank's protected actions. Further, Sank has presented no direct evidence that CUNY's apparent rationale, based solely on the papers submitted by Sank, that the university bylaws did not permit the Anthropology Department bylaws to remain, was a pretext for discrimination. Nor has she pointed to any similarly situated person who has been treated differently. As a result, this claim would be futile if added and Sank's motion to amend her Complaint to add it is denied.

Thus, it is only necessary to consider whether Sank has raised a genuine issue of material fact with regard to her remaining claims.

[page 32]

B. <u>The Remaining Claims</u>

As a result of the above determination, Sank's only remaining claims are those based on the 1993 course schedule that did not include Academic Advising, the errors in the Fall 2001 course catalog and the cancellation of one of Sank's courses in the Fall of 2001 for under-enrollment.

Sank has not established any direct evidence of retaliatory animus for any of her claims. Therefore, she must rely on temporal proximity alone to establish a causal connection. Sank filed her first discrimination charge on August 8, 1989, and her third and final charge on March 3,

1990. The first act of which Sank complains, the failure to assign Sank to Academic Advising, first became an issue in December 1991, and was not effectuated until the spring of 1993. Thus, at the earliest, approximately twenty months elapsed after the filing of Sank's latest discrimination charge to the beginning of the complained of activity. Such time is too great to support a causal connection. Clark Co. Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001) (granting summary judgment in favor of defendant employer on retaliation claim where 20 months had elapsed between EEOC charge and alleged retaliatory act, on the grounds that the temporal proximity between employer's knowledge of the protected activity and adverse employment action must be "very close"). The other actions complained of occurred in the spring and fall of 2001. The most proximate protected activity

[page 33]

to that time was Sank's commencement of this lawsuit, the latest amended complaint of which was filed on May 27, 1994. The approximate seven years separating the protected activity and the purported adverse action is no where near "very close" and thus cannot support a finding of causality.[26]

Even resolving all ambiguities and drawing all inferences in Sank's favor, she therefore has failed to meet her prima facie case with regard to these events. Manessis v. N.Y. City Dep't of Trans., No. 02 Civ. 359, 2003 U.S. Dist. LEXIS 1921, at *38 (S.D.N.Y. Feb. 10, 2003) (granting summary judgment in employer's favor because plaintiff failed to adduce direct evidence of retaliation or a temporal proximity establishing causality). In any case, even if she did not, she has failed to raise a triable issue of fact with regard to whether the Defendants' legitimate non-discriminatory reasons were pretextual.

With regard to Sank's course schedule in the spring of 1993, the Defendants have pointed to the financial difficulties facing CCNY as a legitimate, non-discriminatory reason. It is

undisputed that CCNY in 1992 reduced by half the amount of release

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[26] In addition, the decision-maker in this instance was unaware of Sank's claims. Gordon v. N.Y. City Bd. of Ed., 232 F.3d 111, 117 (2d Cir. 2000) ("lack of knowledge on the part of particular individual agents is admissible as some evidence of a lack of a causal connection, countering plaintiff's circumstantial evidence of proximity or disparate treatment" but jury nonetheless can find retaliation if "an agent is acting explicitly or implicitly upon the orders of a superior who has the requisite knowledge").

[page 34]

time available for all faculty in all departments who participated in Academic Advising. Further, Sank has not disputed that CCNY was experiencing financial difficulties at that time, and that those difficulties necessitated the curtailment of available release time for all faculty at CCNY. In addition, although her request was at first denied, Sank was eventually assigned to Academic Advising in the Spring of 1993 in addition to the other three courses for which she had been assigned and which she was required to teach to fulfill her obligations. This assignment resulted in Sank's having a "contractual overload."

When she filed a grievance about this overload, the compromise reached was that she would withdraw her grievance in exchange for resigning from Academic Advising and receiving compensation for the 15 hours she spent in the program. Sank has presented no evidentiary support for her contentions that the above actions occurred as a pretext for retaliation.[27] Indeed, given the handling and settlement of her grievance in that regard, it would

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[27] The factual dispute with regard to the knowledge of the department chairman, Besmer, of the discrimination charge at the time of the course assignment is insufficient to save this claim. E.g., Aguirre v. N.Y. State Police, 156 F. Supp.2d 305, 323 (S.D.N.Y. 2001) (dispute regarding defendants' knowledge of plaintiff's previously filed EEOC charge did not prevent grant of summary judgment in defendants' favor on Title VII retaliation claim because plaintiff had not offered evidence to establish that his termination was based on retaliation, rather than on a non-retaliatory

reason, i.e., misconduct). In any case, Sank now alleges that she was first denied the position in December 1991, when Laderman -- not Besmer -- was still chairperson. Indeed, it was Laderman who eventually relented and assigned Sank to Academic Advising.

[page 35]

be difficult for her to do so. Therefore, her claim regarding an Academic Advising assignment in the spring of 1993 cannot stand on these grounds either.

Sank's second remaining claim involves the error in the Fall 2001 course catalog. It is undisputed that CCNY's records show that the error in the course schedule was corrected on May 8, 2001. Nor has Sank presented any evidentiary support for her contention that the error remained uncorrected or that the May 8, 2001 record was somehow manufactured after the fact. She merely speculates that even if the prerequisite was deleted in a timely fashion, the fact that it remained in the course catalog likely scared students away from her course. This speculation does not rise to the level of a triable issue of fact, particularly given the fact that the error likely resulted from the upgrade of the SIMS system, that there is no evidence that the person in charge of the process was aware of Sank's discrimination charge and lawsuit, and the fact that the error was corrected in a timely manner and in the same manner in which similar errors were corrected.

It is true that Sank requested that the administration take additional steps to correct the mistake than they normally take by, for instance, printing and distributing an errata sheet to reflect the deletion of the prerequisite, and that the administration refused to do so. There is no evidence that the administration ordinarily took these extra actions, and as a result, Sank

[page 36]

cannot base a retaliation claim on the fact that the administration acted as it normally did, instead of going beyond the norm. As a result, the Defendants' motion with regard to this claim is granted, and Sank's claim based on the

error in the catalog must be dismissed for failure to raise a triable issue of fact with regard to whether the Defendants' rationale was pretextual.

Sank's final claim is somewhat related to the error in the course catalog, in that she claims that the mis-described ANTH 29500 was precipitously cancelled for being under-enrolled. The Defendants have presented a legitimate non-discriminatory reason for this cancellation: ANTH 29500 had an enrollment of only three students, and the lowest enrollment of all the Anthropology electives. The Dean of Social Sciences therefore decided to cancel ANTH 29500 for lack of enrollment and to permit two other underenrolled classes, ANTH 24600 and ANTH 24900, which had seven and five students respectively, to remain open in anticipation that they would enroll a minimum of ten students.

There is no evidence that the Defendants' legitimate non-discriminatory reason was a pretext. Sank did not complain about any other cancelled courses occurring in the prior twelve years since she first filed her discrimination charge. In addition, there is no specific evidence that the administration created the "less than ten students" rule as a means of canceling Sank's course, nor that the administration failed to enforce the rule

[page 37]

against others similarly situated except for the other anthropology electives that had larger enrollments than ANTH 29500. The mere fact that the administration chose only to cancel the lowest enrolled of the anthropology courses is insufficient to raise a genuine issue of fact with regard to whether its rationale was pretextual.

Sank has suggested that the administration should have stayed the cancellation until the end of the registration period (one day after it was cancelled, August 23, 2001), or even later. While such action perhaps could have resulted in the class garnering seven more students, it also could have

resulted in the three or more students registered in the class being forced out with no time left in the registration period to seek another elective. In light of the absence of any evidence that the administration acted contrary to established policy or treated Sank differently from those similarly situated, Sank's speculations are insufficient to raise a triable issue of fact. As a result, the Defendants' motion regarding Sank's claim based on the cancellation of ANTH 29500 is granted, and that claim is dismissed.

To sum up, a Title VII retaliation claim will not be permitted to become a vehicle to litigate grievances by a tenured professor at war with the administrators of the college.

[page 38]

Conclusion

For the foregoing reasons, Sank's motion to amend her complaint to add additional claims of retaliation dating from eight to eleven years ago is denied, and the Defendants' motion to dismiss is granted. Sank's remaining claims of retaliation are hereby dismissed.

It is so ordered.

New York, NY
April 4, 2003

/s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

DECIDED: April 4, 2003
CITATION: *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), 5471 (S.D.N.Y. 4/4/2003)

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
DIANE SANK,

Plaintiff,

- against -

94 Civ. 0253 (RWS)
ORAL
OPINION

THE CITY UNIVERSITY OF NEW YORK, JOSEPH MURPHEY, et al.,

Defendants.
----------X

APPEARANCES:

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The following Opinion, orally issued October 7, 2002, is referenced by the page numbers of the bench trial transcript, with The Hon. Robert W. Sweet, U.S.D.J., presiding. The following is from final Trial Transcript, Volume 6.

page 818

Summation - Ms. Sank

1 So in conclusion, on the basis of all of these facts,

made clear by my own testimony, that of other witnesses, and even that of Dr. Harleston himself, the documents which I have placed in evidence, the transcripts of Dr. Harleston, the depositions of Dr. Harleston, and the various facts which your Honor has taken as established, defendants should be found to have discriminated against me in removing me from my chair position and retaliating against me for complaining of that discrimination to the Human Rights Commission. And for that I thank you, your Honor, for your patience, your extraordinary patience and your consideration of my case. And I rest my case.

THE COURT: Thank you all.

MR. BANK: Your Honor, do we have any schedule after this to deal with?

THE COURT: Yes, we will.

The parties to this dispute are Diane Sank, who has represented herself from time to time in these proceedings pro se. She is a courageous and stubborn woman, born in 1927. The defendant in this case is the City University of New York. Mrs. Sank has been at the City University of New York as a Professor of anthropology since 1968. And she was chairman of that department from 1969 to 1972.

This case has been a long, drawn out, difficult litigation. It started on January 18, 1994, and the extent of

page 819

the suffering by both the parties and the Court is exemplified by the 35 pages of docket entries in this matter.

The nature of the case is, it is a Title VII discrimination case in which Mrs. Sank urges that her discharge as chairman of the department was an act of discrimination against her by the president because she is a white female.

In addition to that, she has alleged in this proceeding that she was retaliated against by the taking of her lab, the way in which the taking was accomplished, and also by the denial of certain requests for leave.

There is remaining in the case, as a result of my opinion of July 31st of this year, a claim for post '91 retaliation, which, as that opinion indicates, is subject to a jury trial. This trial, of course, has been a non-jury trial which commenced on September 30 and is closing today.

In the course of this trial, witnesses have been presented. In particular, of course, the plaintiff, Diane Sank, Lucie Saunders, Howard Adelson, Bernard Harleston,

Owen

Lynch, Anna Causi, Anthony Pecheko, Jeffrey Rosen, Fremont Besmer, Carol Laderman, Leonard Jeffries, and John Deane.

Based on these proceedings, I reach the following factual conclusions, findings of fact: I think the plaintiff, Mrs. Sank, was well described by the outside review committee as the victim of the neurosis of her department. That is, I believe, an accurate description, and I also think that it has

page 820

created other neuroses which followed it.

By way of background, the university, of course, is a functioning institution of higher education and for many years was the jewel in the crown of the city in that regard. It is, like every university, governed by a set of somewhat difficult-to-comprehend and arcane rules relating to faculty conduct, department administration, and other such matters.

In addition, of course, to the traditions of academia and its rules for self-governance, there is a union contract, and that also provides for certain remedies. And of course, in addition to that, there are the statutes which gave rise to this particular claim.

The department of anthropology at the City University has been in turmoil over a period of years, and Ms. Sank explained the nature of the controversy in the department. The department prides itself on a four-field discipline, which simply indicates that there are specializations within the field of anthropology, and they range on the right, or on the left, depending on one's point of view, from genetic or biological anthropology, and at the other end of the spectrum, cultural anthropology.

(Continued on next page)

page 821

These fields are strongly felt and they are reflected in contention between the faculty members, and it is difficult to reach a consensus. In addition to this, this is a department which over time has suffered attrition and is now in a weakened condition, this partly as a result, as indicated by the outside review committee, of the emphasis on the core curriculum and a review of the anthropologists and insufficient support from the administration for their discipline. The result of this has been turmoil in this particular department.

The president of the college, by way of background during the period in question, was Bernard Harleston from 1981

to 1992. Prof. Harleston is a black and was devoted to doing all that he could to improve the ethnic balance of the university, and in his view that meant a strong program of affirmative action seeking more people of color to join the faculty. He noted that four out of five of the students are minorities, and this effort at affirmative action was as aggressive as he could make it. There was also a course of conduct which has been demonstrated in this trial where on a number of occasions whites and sometimes females were replaced by the administration by black males.

It is also clear that this is the subject that Prof. Harleston believes in as entirely appropriate. There has been mention, and he has acknowledged his membership in Sigma Pi Phi, an organization devoted toward, at least in part, not only

page 822

the brotherhood, but the advancement of its members, almost all of whom are black and all are male.

Without specific reference the statistics in this area presented by Ms. Sank are far from complete, but they do indicate a course of conduct which reflected efforts by President Harelston to achieve affirmative action in the university. With that background in mind, that brings us to consideration of the facts relating to particular charges which have been brought here.

The history of the department as the chairmanship of the department is that Prof. Sank was chairman of the department between 1969 and '72 and according to her testimony, which was unchallenged, she was highly successful. There were more students and more majors interested in anthropology and taking graduate degrees. In the period from 1972 to 1987 two professors of the department alternated the chairmanship, Professors Leacock and Nash. This was an arrangement which was obviously satisfactory to them and to the department. Unfortunately, Prof. Leacock died, and in the Spring of '87 it was necessary to consider a replacement, and the faculty of the department split asunder, I gather not and unusual circumstance for that faculty. Parenthetically, the practice, presumably in all but at least in this university, is to have the chair of the department elected by the faculty, and after an initial split there was a switch of one member, and Ms. Sank Was

page 823

elected. The initial vote was four to two. Whether it was made unanimous thereafter, I'm not sure, but, in any case, she was elected as chairman of the department in the Spring of '87.

There was, however, a cloud on the horizon in the form of an outside review committee which was asked to serve and appointed in the fall of '87. An outside review committee is an academic review, as the name implies, from those outside of the university, and the anthropology department was just one of the departments that was reviewed. There were two professors, Prof. Pollister from North Carolina, I believe, and Prof. Owen Lynch from NYU. The state of the department obviously was the subject of concern, and the president requested that the chairman prepare a report on the state of the department. That report is part of the record and was prepared by the chairman, Mrs. Sank, somewhat under protest, because it was her view that the prior department chair had failed to accomplish his duties in that regard. Nonetheless, a report was submitted. The report itself, I think carefully reviewed, indicates some of the distress in the department.

The outside reviewers conducted their study. They visited the department on December 3rd and December 4th of 1987 and talked to the members of the department. They rendered their report on January 13, 1989, and in that report recommended that the chair of the department be relieved and that an outside chair be appointed, as the word receivership

page 824

has been used, in effect to run the department until a search could be made for an outside chair. The line which grabs Mrs. Sank's attention and the attention of anybody who has read the report is on page 10. And the conclusion of the outside review committee that: "The responsibility for the department's presence distemper, disarray and drift is that of the department as a whole." There is nothing that has been demonstrated in this trial to counter that conclusion.

There has been an attack upon the report on the grounds that it does not have any basis and without rehearsing the report, there are practices, the use of students, the use of adjuncts course curricula, other things that form a substantive basis for the conclusions of the committee. The committee report having been made, the department, whether it was invited or sought I don't recall precisely at the moment, but, in any case, the department responded to the outside review committee.

Mrs. Sank responded in very clear and emphatic terms and four other members of the department responded. The four supported the conclusions of the report, including the replacement of the chair. In this regard it appears that at least one of the members of the faculty changed an opinion from a previously held opinion. Then the president met with the department as a whole which together with the dean. Parenthetically, here again, there is a dean of social

page 825

sciences. This is the dean who supervises more than one department, but in this case supervised the anthropology department and provost, also, as I recall, met with the faculty. The report of the outside review committee was discussed, and while there are differing views of that discussion as to its depth, I conclude that was an appropriate meeting for the circumstance, the result of which was that the president concluded that he had the support of the faculty, not all of the faculty to be sure, but the support of the faculty in making a change.

Also, the report recommended three people to be considered as conducting this receivership, Lucille Saunders, Jane Snyder and Delmos Jones. Saunders and Snyder had been chairs of anthropology departments in other institutions or graduate center of the City University, and the third candidate was Delmos Jones who was an anthropologist at the graduate center of City University. These three candidates were suggested in the report.

On April 27, Mrs. Sank Was discharged by the president and subsequently Jones was designated as, I believe, the acting chair of the department and then subsequently by vote of the department. That vote took place in June, and one of the facts of academic life that has been demonstrated in this case is that nothing happens during annual leave, and any act committed during annual leave is null and void. And that in fact was

page 826

Mrs. Sank's position, and it turned out that that position was upheld. I guess it was the following year in point of fact that that happened.

In any case, Jones served as chairman of the department during the academic year '88-'89. Following that, he declined to continue in that post and the faculty selected Freemont Besmore to serve for the year '89-'90 and that meeting

took place in June. Mrs. Sank filed a grievance. Ultimately, the election was terminated, I guess is the way to put it, held null and void, and then another election was held and Besmore proceeded to be the chairman of the department.

During the first Jones year '88-'89, an effort was made to find a chairman for the department from outside which was unsuccessful. Then in the year '89-'90, another effort was made which resulted in a selection by the president from the search committee which had been made up of the members of the faculty, and there has been testimony both with respect to the search in the Spring of '88 and the appointment of Jones, and the search in '89 with respect to the appointment of Besmore as to whether the practice was to rank candidates or not to rank them.

I should also note that Delmos Jones is a black male. President Harleston testified that he did not believe the recommendation came to him ranked, and that he in all instances disregarded ranking and made his own decision based on whatever

page 827

advice he had from the dean or the provost.

Mrs. Sank in the Spring of 1988, after the report, wrote a letter to the president indicating that it was her intent to remain as chair, both on the merits and as a matter of academic procedure and freedom, objecting her removal or contemplated removal by the president. In that connection she has pointed out, without contradiction, that there had been no prior instance of a removal of a faculty-appointed chair. However, there is no contention here that the president was acting outside of his authority since he relied on a provision of the bylaws that permitted such removal of a department head and the language of the bylaw is: "In the interests of the college."

There has been testimony to the effect that Mrs. Sank was not offered an opportunity to resign and that is indeed the case, she was not, although such an effort in the light of her letter was contradicted and easy resolution of the issue.

Following this change in the chairmanship of the department a year later Mrs. Sank Was deprived of her lab, and in her view, as she put it, this is the crux of the case. It should be noted, and I should have noted it earlier, Prof. Sank has a distinguished career and that was well noted by the outside review committee that stated: We were impressed with her development of new techniques for computer analysis and

some other things, and they indicated that she should be

page 828

encouraged and receive support. Essential, she maintains, to this work is a lab which would house whatever an anthropologist houses by way of research. In this case I suppose fingerprints but what else I don't know; also, computers and other materials which she feels were essential to her. And it was her position that, and in this proceeding she has taken the position that the only reason her lab was removed was as an act of retaliation.

I should note, of course, and the record is full of it, that she filed the appropriate proceedings to make a discrimination claim and received the right to sue letter although the Commission of course found no grounds on which to act.

The subject of space in the City University has been an extremely difficult one over time, and the testimony of the vice-president in charge of space -- which somebody noted was an interesting title -- but his job was to find additional space in order to be able to renovate a substantial building on the campus, and that was a task which he undertook in the Fall of 1988. In connection with that, he toured the campus, spoke with the space advisory committee, that was both faculty and administration group, on the subject of space needs and such. As he made this tour, he came to the conclusion that the laboratory which was Mrs. Sank's, 705, was not being utilized or not being utilized to a high degree. The pressure for space

page 829

was in part as a result of the demands of the computer science department, understandable I suppose in today's world, and it had been initially planned that is by the vice-president in charge of space, to take room 706 and 707 for that purpose. As he reviewed this and he discussed this with the dean of the social sciences department, Dean Rosen, and they had meetings on June 27th and June 28th in which his proposals were discussed and these proposals were then passed on to the department chairman at that time.

The department was not overly concerned because they wanted to preserve one particular room and they were assured that was going to happen. As this survey continued, the computer science department made a demand for contiguous space,

and that caused a review which in turn caused Posenko to determine that the room 705 and 706 should be taken, and he also discussed this with Dean Rosen. After these discussions, he then formulated a plan. He had these discussions with Dean Rosen. Rosen was aware that this plan would create problems and in particular for Prof. Sank, and notified the provost that the plan was going forward. The plan was codified in a removal schedule of July 13th, and in that removal Posenko upon completing this plan very sensibly left town, And went on vacation until the end of the month. However, the plan, of course, became known and became known to the chairman of the department.

page 830

Communication between members of the department and the staff and the administration on subjects apparently is a matter of boxes, and you can put something in somebody's box and Besmore saw the plan on the 20th of July and recognized that it would create distress for Prof. Sank because the plan called for the removal of the materials in her lab, and the placement of those materials in another room 703.

Recognizing this difficulty, he left a letter in her box for her advising her of these facts and also directed that a letter be mailed to her by the secretary of the department. One of the recommendations of the outside review committee was that the secretary of the department who was, Sandra McDonald, was something of a problem in terms of her functioning, and that she as well as the chairman were to be removed.

Mrs. Sank had proffered, although I have not reviewed it, an envelope which she says is the envelope in which the letter arrived which was postmarked on July 26. The notice that the chairman of the department got of these events took place on Thursday, the 20th. The mailing was on the 27th according to the postmark, and Mrs. Sank received the information on the 27th. The postmark was on the 26th. She received the information on the 27th. It happened that the chairman was in the department on the 27th, that is the Thursday, and Thursday apparently is pay day, which is the motivating fact, even during annual leave, for people to come

page 831

visit the department.

In any case, he was at the department. He spoke with his secretary, and asked whether or not anything had happened,

and she reported that no action had been taken with respect to the move. When on the 28th Mrs. Sank received information about this move she was distressed in the extreme and among other things, called Dean Rosen up and Prof. McCracken who was of the computer science department who indicated that he didn't care what room she had as long as they were contiguous, and, by the way, didn't she know that it was all done anyhow, and that it was finished. Rosen offered to meet on the 31st and to discuss it and to make some plans to see if there was additional space that could be made available to ameliorate the situation.

Mrs. Sank viewed the premises on the 28th and was upset to find that the lab had disappeared, as she couldn't, I gather, get into where it had been taken because she didn't have a key. I should also add that as far as witnesses go, Richard Pashenko was entirely credible, forthright and direct. He is a respected architect and has moved steadily from one institution to another with ever increasing responsibility and respect. He was an impressive witness. He also testified that he didn't know Prof. Sank or of her discrimination complaint.

In addition, to the claim of retaliation with respect to the removal of the lab, there is the claim relating to the

page 832

award of fellowships. Mrs. Sank sought in '89 and '90 to be awarded what are called full pay half semester fellowships. The description of the fellowship indicates its purpose, and the testimony was clear that these fellowships are rarely given and that there is a greater probability of being able to get a fellowship which of course is discretionary, if one seeks a half pay full year fellowship. The economics of that apparently is a fact.

These fellowships are granted by a process in which the applicant fills out an application. The application is voted on by the appropriate departmental committee. It then goes up the chain to the administration and then ultimately to the City College review committee, and then ultimately to the president. In 1989, that process was followed and the application did not get beyond the City College review committee. It was approved at the departmental level by the faculty, and through the administration, but failed at the City College review committee.

The application the following year failed to gain the approval of the executive committee of the department and there is some indication that perhaps it had not accorded to the

necessary time schedule, but, in any case, it did not gain the approval of the department.

In this connection, there is a provision in the collective bargaining agreement to the effect that special

page 833

consideration should be given to people seeking leave who have been members of the faculty for 14 years. In any case, President Harleston did not act on the leave request because they had not reached him.

As a result of the factual findings, and applying the customary McDonnell-Douglas procedures with respect to the burden of proof, I conclude that there was a prime facie case of discrimination that Mrs. Sank established a prima facie case of discrimination, and I'm speaking now of her discharge; that there was a explanation by the City University; that explanation in short being the recommendation by the outside review committee, and Mrs. Sank has not established that that explanation was pretextual. Therefore, that cause of action has not been established.

In that connection, we're familiar with the problems that are created. First of all, the discharge is not the replacement. The two acts were not simultaneous. In fact, the discharge occurred independent of the selection of Jones, but it is fair to say that given his effort toward affirmative action President Harleston undoubtedly, if all other things were equal, would have selected a black male or perhaps a black female, but certainly an African American. The Supreme Court in Johnson v. Transportation Agency, 107 Supreme Court 1442, has noted the appropriateness of having a moderate flexible case by case approach to gradual improvement in the

page 834

representation of minorities. Our Court of Appeals has similarly indicated in Klow v. City of New Haven, 2000 Westlaw 338066 2d Cir., [sic] the intent to remedy past discrimination against minorities does not amount to forbidden racial classification or an intent to discriminate against nonminority candidates unless it involves quotas, set aside preferential grading that prevents nonminorities from competing. This obviously is a clearly difficult clearly area, but the facts here do not establish that the independent outside review was pretextual.

One could hypothesize that the recommendations of the

outside committee were not held in good faith and that the intent of the committee was to recommend a black, but there is no evidence of that, and I refuse to draw that inference. Having had the testimony of Prof. Lynch, it's a good faith honest recommendation which obviously was quite offensive to Mrs. Sank, but, nonetheless, was not pretextual and she has not established that it was pretextual.

With respect to the retaliation, the taking of the lab was similarly not, one could argue, that a prima facie case was made just by virtue of the filing of the discriminatory complaint by Mrs. Sank and an adverse action. But even if you reach that conclusion, which I don't, but even if you did reach that conclusion, there was an independent basis for taking the lab that clearly was not pretextual. It was not aimed at Prof.

page 835

Sank. It was aimed at obtaining space that the university needed in order to rehabilitate their other facilities and while she may feel that the department did not stand up and fight for her, the department in fact was relatively weak in terms of the relative demands of the two departments. So that the decision to take the lab was not a retaliation. It was an action by the university to solve their construction needs.

As far as the question of the notice, perhaps all it does is to demonstrate that the outside review committee was correct in recommending a new secretary, if in fact the letter which was to be mailed, according to the chairman of the department, on July 20th was in fact not mailed until July 25th. However, had that happened, there is no indication that that was any kind of an act of retaliation by Sandra McDonald, and even if it were, there is nothing that would have flowed from it to change the circumstance, so that if the notice was inadequate, and it was unfortunate, clearly, it doesn't amount to a retaliation.

As far as the denial of the leave applications, they do not constitute retaliation, unless it be assumed that the entire department is retaliating against her because of her discrimination complaint, but there is no evidence of a link between the discrimination complaint, no evidence of an intent to retaliate, and, as a matter of law, there has to be more than simply knowledge of the filing of a protected activity,

page 836

the complaint, to make an adverse employment action

retaliatory. Were it otherwise, there could be no adverse action taken against anyone who had filed a complaint, and that nexus, that link, that causality has not been established by this record. So for that reason I conclude that the claims based on retaliation will be dismissed.

I suggest that the parties should submit a judgment notice. In addition, because I'm aware that this has been a trial of a week, and that there may be things which I have inadvertently misstated or not correctly characterized, I would suggest a schedule, whenever the parties want, by which time any motions to amend the findings and conclusions would be entertained. They are the findings and conclusions which I have reached today. But if the parties were to persuade me otherwise, I'd be very pleased to change them if I thought it was warranted.

That also leaves the question of the post '91 retaliation claims. I have already held that those have stated a cause in view of my conclusions today, and I am somewhat more dubious about that cause just on the question of time, but I don't preclude it. I think it would be appropriate for us to schedule a time when those claims can be heard by a jury or they could be made the subject of motion by the parties, if they felt that was appropriate. So the two things I would suggest, and they could be the same, it's the convenience of

page 837

the parties that should control, a time to have, if you wish, an argument and presentation of papers, and an argument on any amendments of the findings and conclusions and a date for a trial on the remaining retaliation claims.

So you all want to address those issues or would you prefer to think about it and then address them or how do you want to handle it?

MS. SANK: Your Honor, I think I really feel that I want to definitely address it, but perhaps I think to be more conservative to say I would like to think about it.

THE COURT: All right. That's fine. Just as a control, you all can arrange anything you want that you can agree on. Given the past history, it's a little hard to get agreement I recognize.

Why don't we do this? Why don't we make any motions addressed to what I have determined on November 6th. That's a little more than a month. Let's have that as a control date. If you all want to change that date, it's fine, and have as a

control date for the trial on the remaining retaliation claims November 18th. If you ali want to change those dates, that's fine.

MR. BANK: Your Honor, just to clarify the motion for summary judgment, if any --

THE COURT: If you are going to make a motion for summary judgment, I think you should make it returnable on the

page 838

6th. Anything else?

MS. SANK: Your Honor, is that independent of our motion to address the decision?

THE COURT: I think those things are independent, yes.

MS. SANK: Would they not be related?

THE COURT: I don't think they are necessarily related. No, I don't think so. Any motions, whether they are directed to the retaliation claim or directed to the findings and conclusions, will be returnable on the 6th unless the parties agree on another date. Anything else?

Thank you all.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

DECIDED: October 7. 2002

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
DIANE SANK,

Plaintiff,

- against - 94 Civ. 0253 (RWS)

THE CITY UNIVERSITY OF NEW YORK, JOSEPH MURPHEY, et al., OPINION

Defendants.
----------X

APPEARANCES:

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[page 1]

Sweet, D.J.,

Defendants City University of New York ("CUNY") and City College of the City of New York ("CCNY") (collectively the "Defendants") have moved pursuant to Rule 56 of the Federal Rules of Civil Procedure to dismiss the

remaining claims in the complaint of plaintiff pro se Diane Sank ("Sank"). Sank's only remaining claims are filed pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), codified at 42 U.S.C. §§ 2000e et seq., alleging that defendants removed her as chairperson of the Anthropology Department based on her gender, race, religion, and age, and retaliated against her after she filed a complaint of discrimination with the New York City Human Rights Commission.

For the following reasons, the Defendants' motion is granted in part and denied in part.

Facts

The parties, proceedings, and facts have been described in greater detail in Sank v. CUNY, 2002 WL 523282 (April 5, 2002) (the "April 5 Opinion"), familiarity with which is presumed. Because Sank has not submitted a Rule 56.1 statement, the facts that were presented in the April 5 Opinion remain the same.

[page 2]

Prior Proceedings

Sank filed her complaint in this Court on January 18, 1994, and an amended complaint (the "Complaint") was filed on May 27, 1994. In a series of opinions, the complaint has been whittled down to the remaining Title VII claims. See Sank v. CUNY, No. 94 Civ. 0253, 1995 WL 314696 (S.D.N.Y. May 24, 1995) (pursuant to Fed. R. Civ. P. 12(b)(6) dismissing (1) plaintiff's claims of discrimination based on age, religion, and disability, (2) plaintiff's Title VII claims against individual defendant Beverly Sowande and the CUNY Board of Trustees, and (3) all of plaintiff's claims under 42 U.S.C. § 1983); Sank v. CUNY, 1997 WL 362150 (S.D.N.Y. June 26, 1997) (dismissing Title VII claims against all other individual defendants).

Defendants filed the instant motion on April 13, 2001 to dismiss all remaining claims. These claims were: (1) Title VII claims against CUNY and CCNY for gender and race discrimination and retaliation; (2) a state FOIL claim against defendant Sowande; and (3) a state contract law claim against CUNY and CCNY. In response, Sank on November 26, 2001 filed a declaration in support of a motion under Rule 56(f) to deny or postpone summary judgment. The motion was deemed fully submitted on February 27, 2002.

In the April 5 Opinion, the court dismissed Sank's state FOIL and contract law claims. The issue of whether summary

[page 3]

judgment should be granted on the Title VII claims was not reached, however, because it was determined that Sank had shown that she needed more discovery before responding to the motion.

A hearing was held on April 10, 2002, at which the Defendants emphatically stated that they had provided all the discovery required of them that they were capable of providing. An order issued on April 12, 2002, stating that Sank would be required to respond to CUNY's summary judgment motion if the Defendants provided a sworn affidavit affirming that they had duly complied with the required discovery. Sank v. CUNY, 2002 WL 548744 (S.D.N.Y. April 12, 2002).

The Defendants supplied the affidavit on May 13, 2002, thus reopening the portion of this motion seeking summary judgment on Sank's Title VII claims. Sank then submitted her opposition papers on June 12, 2002, and the motion was considered fully submitted at that time.

Discussion

I. Standard of Review[for Summary Judgment

Rule 56(e) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and

[page 4]

admissions on file, together with affidavits . . . show that there is no genuine issue as to material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Silver v. City Univ., 947 F.2d 1021, 1022 (2d Cir. 1991). "The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish her right to judgment as a matter of law." Rodriguez v. City of New York, 72 F.3d 1051, 1060-61 (2d Cir. 1995). In determining whether a genuine issue of material fact exists, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Gibbs-Alfano v. Burton, 281 F.3d 12, 18 (2d Cir. 2002).

"The salutory purposes of summary judgment -- avoiding protracted, expensive and harassing trials -- apply no less to discrimination cases than to commercial or other areas of litigation." Nicastro v. Runyon, 60 F. Supp.2d 181, 183 (S.D.N.Y. 1999) (citing Dister v. Continental Group, Inc., 859 F.2d 1108, 1114 (2d Cir. 1988)). Greater caution must be exercised, however, in granting summary judgment in employment discrimination cases where the employer's intent is genuinely in issue. Belfi v. Predergast, 191 F.3d 129, 135 (2d Cir. 1999). This is so because "[e]mployers are rarely so cooperative as to include a notation in the personnel file that the [action complained of] is for a reason expressly

[page 5]

forbidden by law." Bickerstaff v. Vassar College, 196 F.3d 435, 448 (internal quotation marks and citation omitted; brackets in the original). But even where an employer's intent is at issue, "a plaintiff must provide more than conclusory

allegations of discrimination to defeat a motion for summary judgment." Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997); Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir. 1985).

In addressing the present motion, the Court is mindful that the plaintiff is proceeding pro se and that her submissions should be held "'to less stringent standards than formal pleadings drafted by lawyers . . . .'" Hughes v. Rowe, 449 U.S. 5, 9, 101 S.Ct. 173, 176 (1980) (per curiam) (quoting Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 595 (1972)); see also Ferran v. Town of Nassau, 11 F.3d 21, 22 (2d Cir. 1993). The Court recognizes that it must make reasonable allowances so that a pro se plaintiff does not forfeit rights by virtue of lack of legal training. Traguth v. Zuck, 710 F.2d 90, 94 (2d Cir. 1983).

Indeed, district courts should "read the pleadings of a pro se plaintiff liberally and interpret them to raise the strongest arguments they suggest.'" McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999) (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994). Nevertheless, the Court is also aware that pro se status "'does not exempt a party from compliance with relevant

[page 6]

rules of procedural and substantive law." Traguth, 710 F.2d at 95 (quotations omitted).

II. Title VII

As an initial matter, Sank's response to the Defendants' motion for summary judgment consists entirely of her argument for why she continues to need more discovery more than eight years after her complaint was originally filed. This argument was finally rejected in the April 12 Opinion. Sank's motion for reconsideration of that opinion has also been rejected. As a result, this Court will reach the merits in this opinion.

A. Discrimination Claim

Claims of discrimination under Title VII are analyzed under the three-part test announced in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). First, the plaintiff must establish a prima facie case of discrimination by showing that (1) she is a member of a protected class and (2) she suffered an adverse employment action (3) under circumstances that give rise to an inference of unlawful discrimination. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Weinstock v. Columbia Univ., 224 F.3d 33, 42 (2d Cir. 2000). Second, if the plaintiff successfully establishes a prima facie case of discrimination, the defendant may rebut that showing by articulating a legitimate, non-

[page 7]

discriminatory reason for the employment action. Burdine, 450 U.S. at 254; Weinstock, 224 F.3d at 42. Finally, if the defendant articulates a non-discriminatory reason, the plaintiff must come forward with evidence that the defendant's articulated non-discriminatory reason is a mere pretext for actual discrimination. Weinstock, 224 F.3d at 42 ("The plaintiff must 'produce not simply some evidence but sufficient evidence to support a rational finding that the legitimate non-discriminatory reasons proffered by the [defendant] were false and that more likely than not [discrimination] was the real reason for the'" employment action (quotations and citations omitted; brackets in original)). Whether a judgment as a matter of law is appropriate depends upon a number of factors, including the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 148-49 (2000).

1. Prima Facie Case

The Defendants argue that Sank cannot establish that her removal as chairperson of the Anthropology Department (the "Department") occurred under circumstances that would give rise to an inference of unlawful discrimination.

[page 8]

However, several circumstances do at the very least present an disputed issue of fact as to whether discrimination may be inferred. CCNY President Bernard W. Harleston ("Harleston") had threatened to shut down the Department because it contained no black faculty. Second, Harleston then appointed a black male as interim chairman in Sank's place, even though two white female candidates had also been vetted. Further, the circumstances of that appointment were suspect: Harleston did not ask Sank to resign quietly, as she claims was the usual practice,*fn1 but instead publicly asked her to step down. Further, he did so without the advice and approval of the university's Ombudsman.

Reading Sank's complaint in the light most favorable to her, she has established a material issue of fact as to whether an inference of discrimination exists.

B. Defendants' Non-Discriminatory Reason

The Defendants state that Sank was removed because she had lost the support of her fellow faculty members and because, as the outside anthropologists noted, there was a need for outside guidance. This is sufficient to state a non-discriminatory reason.

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1 Although the CUNY By-laws at that time permitted CCNY's president to remove a departmental chairperson "as the interests of the college may require" after conferring with members of the department, Sank claims that this incident was the first time in CCNY's history that a department chair was removed, rather than quietly asked to resign.

[page 9]

C. Pretext

Sank argues that Harleston had a discriminatory agenda in that he wanted to make CCNY a black male-dominated institution.

The Defendants, however, point to the fact that Sank's removal was endorsed by four of the six faculty members of the Department and was recommended by impartial outside evaluators. They also note that the Department's eventual decision to elect a white female chairperson after an exhaustive search is indicative of the non-existence of any discriminatory agenda.

However, the facts detailed above call into doubt the excuses given by the Defendants. First, the Defendants' reliance on the fact that Sank's removal was endorsed by faculty members is drawn into doubt by the very public stance of the faculty members' boss, Harleston, that they might lose their Department (and thus potentially their jobs) if more black faculty were not hired in the Department. As a result, their vote might have been influenced by the alleged racist and sexist animus that Sank attributes to Harleston. Further, the fact that a white female was eventually selected also is drawn into question by the fact that the selection took time. Sank's immediate successor was a black male. Then, a white male was elected under dubious circumstances for the next term. In addition, Sank had already filed her complaint by the time the white chairwoman was elected. This circumstance alone presents an issue of disputed fact as to whether the Defendants

[page 10]

specifically sought out a white chairwoman to rebut Sank's complaint.

As a result, Sank has presented a genuine issue of material fact, and the Defendant's motion to dismiss the Title VII discrimination claim is denied.

III. <u>Retaliation Claim</u>

A Title VII retaliation claim is also analyzed under the rubric of McDonnell Douglas. Tomka v. Seiler Corp., 66 F.3d 1295, 1308 (2d Cir. 1995). First, in order to make out a prima facie case of retaliation, a plaintiff must establish (1) participation in a protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action. Quinn v. Green Tea Credit Corp., 159 F.3d 759, 768-69 (2d Cir. 1998). Second, if the plaintiff establishes a prima facie case of retaliation, the defendant may articulate a legitimate, non-retaliatory reason for its actions. Id. at 768. Finally, if the defendant does so, the plaintiff must prove that the proffered reason is merely a pretext for retaliation. Id. at 769.

The Defendants here challenge whether Sank has made her prima facie case. They argue that Sank did not suffer an adverse employment action and that the alleged adverse actions were not

[page 11]

causally connected to the filing of her complaint with the Commission.

Adverse employment actions include "discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand." Morris v. Lindau, 196 F.3d 102, 110 (2d Cir. 1999) (citations omitted). The Second Circuit has also held that lesser actions may qualify, but has not provided a bright-line rule with regard to such lesser actions. Id. In Bernheim v. Litt, 79 F.3d 318, 327 (2d Cir. 1996), the Second Circuit has found in the case of plaintiff teacher such lesser actions to include negative evaluation letters, express accusations of lying, assignment of lunchroom duty, reduction of class preparation periods, failure to process the teacher's insurance forms, transfer from library to classroom teaching, and assignment to a classroom on the fifth floor which aggravated the teacher's disabilities. Id. However, "[b]ecause there are no bright line rules as to which employment actions meet the

threshold for 'adverse,' courts must make this determination on a case-by-case basis." Wilburn v. Fleet Fin. Group, Inc., 170 F. Supp.2d 219, 237 (D. Conn. 2001) (quoting Richardson v. New York State Dep't of Correctional Servs., 180 F.3d 426, 446 (2d Cir. 1999)).

To sustain an adverse employment action, a plaintiff must "endure a 'materially adverse change' in the terms and conditions of employment.'" Galabya v. New York City Bd. of Educ., 202 F.3d

[page 12]

636, 640 (2d Cir. 2000) (quoting Richardson, 180 F.3d at 446). In order for the action to be "'materially adverse,' a change in working conditions must be 'more disruptive than a mere inconvenience or an alteration of job responsibilities.'" Id. (quoting Crady v. Liberty Nat'l Bank and Trust Co. of Indiana, 993 F.2d 132, 136 (7th Cir. 1993)). A "'material adverse change' is one that 'has an attendant negative result, a deprivation of a position or an opportunity.'" Campbell v. Grayline Air Shuttle, Inc., 930 F. Supp. 794, 802 (E.D.N.Y. 1996) (citing Medwid v. Baker, 752 F. Supp. 125, 136-37 (S.D.N.Y. 1990)). While adverse employment actions extend beyond readily quantifiable losses, "not everything that makes an employee unhappy is an actionable adverse action." Phillips v. Bowen, 278 F.3d 103, 117 (2d Cir. 2002) (stating that employee's "trivial complaints about an unpleasant working environment" do not constitute adverse employment actions).

In her complaint, Sank alleges that she experienced two adverse employment actions: (1) alleged threats by her colleagues in the Department to take away her research computer; and (2) the dismantling of her research laboratory.

As the Defendants point out, the research computer was never, in fact, taken. Sank was not thereby deprived of a position or an opportunity. Further, she has failed to allege how the threats rose to a "sufficiently severe" level that could

reasonably be claimed to constitute a change in Sank's conditions and terms of

[page 13]

employment. Richardson, 180 F.3d at 446 (unchecked retaliatory co-worker harassment may constitute adverse employment action if sufficiently severe); Gallo v. Herman, No. 97 Civ. 8359, 1999 WL 249709, at *3 (S.D.N.Y. April 28, 1999) (derision from co-workers insufficient to establish adverse employment action in absence of specific facts showing nature of derision or how it rises to a materially adverse change), aff'd 205 F.3d 1322 (2d Cir. 2000). Sank's retaliation claim is dismissed with regard to this allegation.

With regard to the taking of her laboratory, the Defendants note that Sank could have been assigned a new laboratory if she had wanted one and assisted in its restoration. Yet Sank refused to participate in the process of readying a new room that had been assigned as her laboratory as a result of campus-wide renovations. Therefore, the Defendants conclude that Sank cannot complain that her laboratory space was "taken" or that she was deprived of a position or opportunity.

Sank can complain, however, that her laboratory space was relocated without her oversight and without her knowledge. While the plan to relocate her laboratory was announced on July 13, 1989, and was scheduled to take place on July 23 and 24, the Department Chairman did not inform Sank of this fact until a week after the announcement, by letter dated July 20, 1989. July 20 was a Thursday, and the move was set to begin on a Sunday. Therefore,

[page 14]

the letter would have had to reach Sank by Saturday in order for her to be aware of the relocation. Given the small likelihood of Sank receiving the notice in time, the Department Chairman's actions virtually guaranteed that Sank's laboratory -- which included personal effects and items Sank considered valuable and irreplaceable -- would be moved

without her presence and knowledge. This invasion of Sank's personal and professional space is an adverse employment action.

The Defendants also argue that Sank has failed to show a causal connection between the relocation and her complaint. The Defendants are correct that the actual decision to move the laboratory was made by the architect in charge of the campus-wide renovations, Anthony Rodriguez ("Rodriguez"). Further, Rodriguez claims that he did not know Sank and was unaware of her complaint. As noted above, however, the adverse action was the failure to inform Sank of the move in time for her to oversee it. The person directly responsible for that was the Department Chairman, who was well aware of Sank's complaint. Given the timing, the situation raises a material issue of fact as to whether there was a causal connection between the lack of notice and Sank's filing of her complaint. Therefore, the Defendants' motion to dismiss Sank's retaliation claim on these grounds is denied.

[page 15]

Conclusion

The Defendants' motion is denied except as to Sank's Title VII retaliation claim based on the threats to take away her computer, which is dismissed.

The parties are directed to attend a pretrial conference on September 10, 2002, at which time a trial date will be set.

It is so ordered.

New York, NY
July 31, 2002

/s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

FILED: August 2, 2002
CITATION: *Sank v. City Univ. of N.Y.*, 219 F. Supp. 2d 497 LEXIS 14034 (S.D.N.Y. 8/2/2002)

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
DIANE SANK,

Plaintiff,

- against - 94 Civ. 0253 (RWS)

THE CITY UNIVERSITY OF NEW YORK, JOSEPH MURPHEY, et al., OPINION

Defendants.
----------X

APPEARANCES:

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[page 1]

Sweet, D.J.,

Plaintiff pro se Diane Sank ("Sank") has moved pursuant to Local Rule 6.3 of the Southern District of New York ("Local Rule 6.3") for this Court to reconsider (1) those portions of its Opinion dated April 5, 2002 dismissing Sank's

claims for monetary relief and her request for trial by jury; and (2) the portion of its Order dated April 12, 2002 that denied Sank's request for additional time for discovery.

For the following reasons, Sank's motion is granted in part and denied in part.

Facts

The parties, proceedings, and facts have been described in greater detail in Sank v. CUNY, 2002 WL 523282 (April 5, 2002) (the "April 5 Opinion"), familiarity with which is presumed.

Prior Proceedings

Sank filed her complaint in this Court on January 18, 1994, and an amended complaint (the "Complaint") was filed on May 27, 1994. In a series of opinions, the complaint has been whittled down to the remaining Title VII claims. See Sank v. CUNY, No. 94 Civ. 0253, 1995 WL 314696 (S.D.N.Y. May 24, 1995) (pursuant to Fed.

[page 2]

R. Civ. P. 12(b)(6) dismissing (1) plaintiff's claims of discrimination based on age, religion, and disability, (2) plaintiff's Title VII claims against individual defendant Beverly Sowande and the CUNY Board of Trustees, and (3) all of plaintiff's claims under 42 U.S.C. § 1983); Sank v. CUNY, 1997 WL 362150 (S.D.N.Y. June 26, 1997) (dismissing Title VII claims against all other individual defendants).

In the April 5 Opinion, the Court dismissed Sank's state FOIL and contract law claims, as well as ruled that Sank was not entitled to a jury trial or to damages because she did not complain of any actions occurring after the effective date of the Civil Rights Act of 1991, which provided for a jury trial and damages to Title VII claimants. The issue of whether

summary judgment should be granted on the Title VII claims was not reached, however, because it was determined that Sank had shown that she needed more discovery before responding to the motion.

A hearing was held on April 10, 2002, to discuss what further discovery, if any, should be granted. An opinion issued on April 12, 2002, stating that Sank would be required to respond to CUNY's summary judgment motion on her Title VII claims if the defendants provided a sworn affidavit affirming that they had duly complied with the required discovery. Sank v. CUNY, 2002 WL 548744 (S.D.N.Y. April 12, 2002).

[page 3]

Sank contests portions of both the April 5 Opinion and the April 12 Order.

Sank's Contentions

In determining in the April 5 Opinion that Sank was not entitled to a jury trial or damages because no events occurred after 1990, the Court relied on the defendants' papers and statements of facts, as well as Sank's complaint and prior opinions. Sank did not submit opposition papers or a Rule 56.1 statement. Instead, Sank only submitted a motion pursuant to Rule 56(f) of the Federal Rules of Civil Procedure seeking more discovery.

In her motion to reconsider, Sank has provided additional facts that she did not provide in opposition to the defendant's motion for summary judgment. She alleges that contrary to the statement in the April 5 Opinion, the following adverse actions occurred after 1990 in retaliation for filing her claim of discrimination with the New York City Human Rights Commission (the "Commission") and were a part of the record:

- Denial of Sank's request for a one-semester leave (sabbatical) in 1991;

- Denial of Sank's request for a one-semester leave in 1992;

- Attempts by President Harleston to fire Sank in 1995 by "retrenching" the Anthropology Department (the "Department"); of the six professors in the Department, only Sank was not secretly promised to be reassigned to other departments and thus only she would have been fired in the retrenching; and

[page 4]

- Deliberate errors in the Fall 2001 course schedule that erroneously stated that there were three mathematics and economics prerequisites for Sank's anthropology class when there were none. Sank requested that the errors be corrected from May 2001 to August 2001, and nothing was done until five days before the close of registration. As a result, Sank's course was substantially undersubscribed, giving the Defendants a pretext to cancel it. The Defendants also canceled the class four days prior to close of registration (a mere one day after correcting the mistake regarding the prerequisites), even though two to three other underenrolled Anthropology electives were left open for enrollment during the first week of classes.

Sank also states that she has "suffered continuously . . . the deleterious stigma and embarrassment of having been removed as Chairperson and having the Administration dismantle and take away" her laboratory. Pl.'s Mot. at 5.

Discussion

In addressing the present motion, the Court is mindful that the plaintiff is proceeding pro se and that her submissions should be held "'to less stringent standards than formal pleadings drafted by lawyers . . . .'" Hughes v. Rowe, 449 U.S. 5, 9, 101 S. Ct. 173, 176 (1980) (per curiam) (quoting Haines

v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 595 (1972)); see also Ferran v. Town of Nassau, 11 F.3d 21, 22 (2d Cir. 1993). The Court recognizes that it must make reasonable allowances so that a pro se plaintiff

[page 5]

does not forfeit rights by virtue of lack of legal training. Traguth v. Zuck, 710 F.2d 90, 94 (2d Cir. 1983).

Indeed, district courts should "read the pleadings of a pro se plaintiff liberally and interpret them to raise the strongest arguments they suggest.'" McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999) (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994). Nevertheless, the Court is also aware that pro se status "'does not exempt a party from compliance with relevant rules of procedural and substantive law." Traguth, 710 F.2d at 95 (quotations omitted).

I. Standards Under Local Rule 6.3

"To succeed on a motion for reargument, the moving party must demonstrate that the court overlooked the controlling decisions or factual matters that were placed before the court in the underlying motion." Lopez v. Comm'r of Soc. Sec., 2002 U.S. Dist. LEXIS 5091, *1-*2 (S.D.N.Y. March 27, 2002) (quotations and citations omitted); see also Shrader v. CSX Transp., 70 F.3d 255, 257 (2d Cir. 1995) (motion for reargument "will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked -- matters, in other words, that might reasonably be expected to alter the conclusion reached by the court").

[page 6]

Rule 6.3 is intended to "ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." Carolco Pictures, Inc. v. Sirota, 700 F. Supp. 169, 170 (S.D.N.Y. 1988) (citation omitted). The parties may not present new facts or theories at this stage. Ralph

Oldsmobile Inc. v. General Motors Corp., 2001 WL 55729, at *2 (S.D.N.Y. Jan. 23, 2001) (striking affidavit that was filed in support of motion to reconsider without court's permission); Primavera Familienstifung v. Askin, 137 F. Supp.2d 438, 442 (S.D.N.Y. 2001) (party may not "advance new facts, issues or arguments not previously presented to the Court") (quoting Morse/Diesel Inc. v. Fidelity & Deposit Co. of Md., 768 F. Supp. 115, 116 (S.D.N.Y. 1991).

Rule 6.3 must be narrowly construed and strictly applied so as to avoid duplicative rulings on previously considered issues, and may not be employed as a substitute for appealing a final judgment. Lopez, 2002 U.S. Dist. LEXIS 5091, at *3; Shamis v. Ambassador Factors, 187 F.R.D. 148, 151 (S.D.N.Y. 1999). The decision to grant or deny the motion rests in the discretion of the district court. AT&T;Corp. v. Community Network Servs. Inc., 2000 WL 1174992, at *1 (S.D.N.Y. Aug. 18, 2000).

[page 7]

II. April 5, 2002 Opinion

As an initial matter, defendants correctly point out that Sank relies entirely on factual allegations that were not submitted as part of or in opposition to the motion for summary for judgment to support her motion for reconsideration of the April 5 Opinion. A motion to reconsider "is limited to the record that was before the Court on the original motion." Frankel v. ICD Holdings, S.A., 939 F. Supp. 1124, 1126 (S.D.N.Y. 1996) (refusing to consider affidavits not submitted as part of underlying summary judgment motion on motion for reargument).

However, courts may consider the entire record before it, in addition to papers submitted on summary judgment. 28 Fed. Proc., L. Ed. § 62:590; see also In re Baumbilt, 229 B.R. 50, 59 (Bankr. E.D.N.Y. 1999) ("Rule 56 permits a court to consider the entire record and does not limit a court's review to that portion highlighted by the motion.").

Sank points out in her reply memorandum that the allegations above -- among others -- were made part of the record, beginning as early as 1996. Therefore, they are not "new" facts and may be considered for the purposes of Local Rule 6.3.

The April 5 Opinion held that Sank had failed to allege any actions occurring after the effective date of the Civil Rights

[page 8]

Act of 1991 and therefore was not entitled to a jury trial and damages. The addition of these facts show that Sank has alleged that some retaliatory actions occurred after the effective date of the Civil Rights Act. As a result, Sank is entitled to a jury trial and damages on at least a portion of her retaliation claims.

Sank appears to suggest, however, that she should be entitled to a jury trial on the entirety of her retaliation claim, even though some retaliatory acts took place prior to the effective date of the Civil Rights Act, because the actions constitute a "continuing violation."

he Second Circuit has not addressed the issue of whether a party may seek retroactive application of the Civil Rights Act of 1991, which has been held not to apply retroactively, if she alleges a continuing violation that straddles the effective date. Other circuits that had addressed the issue are split. Place v. Abbott Laboratories, 215 F.3d 803, 807 (7th Cir. 2000) (discussing circuit split). The Court of Appeals for the District of Columbia and the Eight Circuit Court of Appeals have rejected this notion. Tomasello v. Rubin, 167 F.3d 612, 620 (D.C. Cir. 1999) ("an award of compensatory damages for preenactment conduct would have an impermissible effect"); Caviness v. Nucor-Yamato Steel Co., 105 F.3d 1216, 1220 n. 1 (8th Cir. 1997) ("We are not familiar with any Eighth Circuit law where the concept of

continuing violation, ordinarily associated with statutes of limitations issues, has been

[page 9]

employed to overcome a non-retroactivity rule"). The Seventh Circuit has refrained from deciding the issue despite suggestive language from prior opinions. Place, 215 F.3d at 807 (citing Taylor v. Western and S. Life Ins. Co., 966 F.2d 1188, 1196 (7th Cir. 1992) (continuing violation theory "is utilized only in the context of a challenge to the timeliness of a cause of action"), but finding that "[r]esolving this nettlesome legal issue is unnecessary to resolving this appeal"). The First Circuit allows the theory. DeNovellis v. Shalala, 124 F.3d 298, 307 n. 4 (1st Cir. 1997) ("a continuing violation theory could be applied to any time requirement imposed by Title VII, whether it be the effective date of an amending statute, as here, or a statute of limitations"). District courts in the Southern District of New York have rejected the theory. E.g., Peele v. New York City Dep't of Social Servs./Human Resources Admin., 1995 WL 110085, at *4 (S.D.N.Y. March 14, 1995) (rejecting continuing violation theory and holding that right to jury trial applies only for post-enactment claims); Tillman v. St. Vincent's Hosp. and Medical Center of New York, 1993 WL 426882, at *3 (S.D.N.Y. Oct. 18, 1993) (rejecting use of continuing violation theory to recover for acts which, when performed by St. Vincent's employees, were not forbidden by that law as inconsistent with ruling that statute did not apply retroactively).

This Court agrees with the weight of authority. Even if Sank could demonstrate that the acts she complains of constitute a "continuing violation" she may only have a jury trial and damages

[page 10]

on the events detailed above that occurred after the effective date of the Civil Rights Act.

The defendants argue that Sank's motion for reconsideration should not be granted because the acts complained of are not adverse acts and should be dismissed.

Adverse employment actions include "discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand." Morris v. Lindau, 196 F.3d 102, 110 (2d Cir. 1999) (citations omitted). The Second Circuit has also held that lesser actions may qualify, but has not provided a bright-line rule with regard to such lesser actions. Id. In Bernheim v. Litt, 79 F.3d 318, 327 (2d Cir. 1996), the Second Circuit has found in the case of a plaintiff teacher such lesser actions to include negative evaluation letters, express accusations of lying, assignment of lunchroom duty, reduction of class preparation periods, failure to process the teacher's insurance forms, transfer from library to classroom teaching, and assignment to a classroom on the fifth floor which aggravated the teacher's disabilities. Id. However, "[b]ecause there are no bright line rules as to which employment actions meet the threshold for 'adverse,' courts must make this determination on a case-by-case basis." Wilburn v. Fleet Fin. Group, Inc., 170 F. Supp.2d 219, 237 (D. Conn. 2001) (quoting Richardson v. New York State Dep't of Correctional Servs., 180 F.3d 426, 446 (2d Cir. 1999)).

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To sustain an adverse employment action, a plaintiff must "endure a 'materially adverse change' in the terms and conditions of employment.'" Galabya v. New York City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000) (quoting Richardson 180 F.3d at 446). In order for the action to be "'materially adverse,' a change in working conditions must be 'more disruptive than a mere inconvenience or an alteration of job responsibilities.'" Id. (quoting Crady v. Liberty Nat'l Bank and Trust Co. of Indiana, 993 F.2d 132, 136 (7th Cir. 1993)). A "'material adverse change' is one that 'has an attendant negative result, a deprivation of a position or an opportunity.'" Campbell v. Grayline Air Shuttle, Inc., 930 F. Supp. 794, 802 (E.D.N.Y. 1996) (citing Medwid v. Baker, 752 F. Supp. 125,

136-37 (S.D.N.Y. 1990)). While adverse employment actions extend beyond readily quantifiable losses, "not everything that makes an employee unhappy is an actionable adverse action." Phillips v. Bowen, 278 F.3d 103, 117 (2d Cir. 2002) (stating that employee's "trivial complaints about an unpleasant working environment" do not constitute adverse employment actions).

Sank has asserted several adverse actions in her motion for reconsideration of the Court's April 5 Opinion. The defendants specifically address the following: (1) the denial of a half-year, full-pay sabbatical in 1991 and 1992; (2) the aborted attempt to retrench the Department in 1995; and (3) mistakes in the course

[page 12]

catalog in 2001.[1] The defendants argue that none of these actions rise to the level of an adverse employment action.

The defendants appear to liken Sank's denial of sabbatical to a case where the fact that an employee was denied vacation time was held not to be an adverse employment action. Boyd v. Presbyterian Hosp. in City of New York, 160 F. Supp.2d 522, 537-38 (S.D.N.Y. 2001). Sank is persuasive in arguing, however, that a sabbatical is a central, longstanding and essential aspect of academic life. Moreover, Sank was denied such a sabbatical after 22 years without one and in express violation of the terms of a collective bargaining agreement. As a result, Sank was supposed to have received "special consideration," and she did not.

The defendants further argue that Sank could have received a different type of sabbatical -- a full-year, half-pay sabbatical -- than the half-year full-pay sabbatical that she requested. Further, during the relevant time, only three one-semester full-pay sabbaticals were given out, as opposed to thirty full-year half-pay sabbaticals. While this may be the case, Sank raises a material issue of fact by pointing out that at

the same time that she was denied the half-year full-pay sabbatical, one was awarded to a male, John Harbeson ("Harbeson"), even though he had

[1] Sank discusses more than the four instances listed above in her reply memorandum in support of her motion for reconsideration. The additional instances will not be discussed as the defendants did not challenge them.

[page 13]

not met what Sank claims was a minimum six-year employment requirement.[2] Moreover, Harbeson was the head of the Faculty Senate committee that had investigated the taking of Sank's laboratory in July 1989 and eventually exonerated the institution. Sank claims that Harbeson refused to consider Sank's charge that the laboratory had been taken from her in retaliation for her protesting and complaining of discrimination, and Harbeson also lost key evidence such as tape recordings of meetings with key administrators. This is sufficient to raise an issue of fact.

With regard to the "retrenching" of the Department, Sank argues that it "was nothing more than a subterfuge for eliminating Plaintiff" and that all the members of the Department except for her were secretly promised transfers to other posts. Further, the action had to be rescinded entirely after the Faculty Senate became aware of the plan. However, Sank was not actually terminated, nor was the Department "retrenched." This therefore does not constitute an adverse employment action as no such action was consummated.

Finally, defendants fail to persuade that the mistakes in the 2001 course catalogue were more of an "inconvenience" than an adverse employment action. First, the circumstances under which the mistake occurred (and was allowed to occur) raise a material

[2] CUNY's Board of Trustees eventually overruled the award of the sabbatical to Harbeson.

[page 14]

issue of fact. Sank sought to get the defendants to correct the mistake in the course catalog for months and was unsuccessful until a few days prior to the end of registration. Then the defendants cancelled the course, while several other low-enrolled courses in the Department remained open for registration. As a result of the underenrollment, Sank claims that the defendants disparaged her and made it a matter of record that not enough students had been attracted to one of her courses. Further, she had to add on an additional class to her spring semester to make up for the one that was cancelled. The confluence of these facts raise a material issue of fact as to whether the mistakes in the 2001 course catalog were an adverse employment action.

The April 5 Opinion is modified to state that Sank is not entitled to a jury trial or damages on events occurring prior to the effective date of the Act but is entitled to a jury trial and damages on any retaliatory actions occurring after that date.

III. April 12 Order

In her motion for reconsideration, Sank seeks to overturn the April 12, 2002 Order and to enjoy untrammeled discovery: the "Defendants should finally be compelled to identify all the relevant personnel from among both their Faculty and Administration ranks, and then identify the race and gender of each, as well as each's full employment history." Pl.'s Mem. of Law at 13.

[page 15]

Further, she suggests that the case be referred to a magistrate judge who can closely supervise the discovery process.

Because Local Rule 6.3 is to be narrowly construed to avoid repetitive arguments on issues that have been considered fully before the Court, motions for reargument should be denied where the movant simply repeats arguments made earlier. Stoner v. New York Ballet Corp., 2002 U.S. Dist. LEXIS 5921, at *8 (S.D.N.Y. April 8, 2002) (denying motion

for reargument where movant simply "rehashes the arguments he made" earlier); Hamilton v. Garlock, 115 F. Supp.2d 437, 439 (S.D.N.Y. 2000) (denying motion for reargument where movant failed to identify authority that was overlooked by the Court, but simply reiterates arguments that were previously considered and rejected).

Sank has utilized the same arguments that she most recently made and which were rejected at the hearing on April 10, 2002. Sank continues to argue that CUNY has failed to produce the requested records that indicate employee race and gender information. The April 12, 2002 Order specifically acknowledged Sank's claim that she has "still not receiv[ed] what she feels she needs to make her case," but ultimately determined, upon the submission of an affidavit by CUNY, that the defendants had in fact complied with her requests to the best of their abilities. Moreover, Sank's efforts to expand discovery to a seemingly boundless extent in the eight-year-old lawsuit were rejected: "This lawsuit has stretched

[page 16]

for almost eight years, and it is time to end discovery, continue on to summary judgment and, if warranted, a trial on the merits." April 12, 2002 Order, at 9.

Sank points out that she has presented "controlling authority" to the contrary, as the April 5 Opinion and April 12 Order appear to be contradictory. It is true, as Sank points out, that the April 5 Opinion dismissed the defendants' summary judgment motion with regard to her Title VII claim. However, the Court treated the defendants' arguments at the April 10 hearing as an effective request to reopen the summary judgment motion, given their representations about the discovery that they had produced. Furthermore, based upon the representations of the parties at the hearing, the April 12 Order granted the defendants' request to reopen the summary judgment motion with regard to the Title VII claim if they affirmed that they had indeed produced all the discovery they were able to.

Sank presents no facts or controlling case law that would merit granting her motion for reconsideration of the April 12 Order pursuant to Local Rule 6.3.

[page 17]

Conclusion

For the foregoing reasons, Sank's motion for reconsideration is granted in part and denied in part.

It is so ordered.

New York, NY
July 31, 2002

/s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

FILED: August 2, 2002
CITATION: *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 14032 (S.D.N.Y. 8/2/2002)

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
DIANE SANK,

Plaintiff,

- against -

OPINION

THE CITY UNIVERSITY OF NEW YORK, et al.,(RWS)

94 Civ. 0253

Defendants.
----------X

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[page 1]

Sweet, D. J.

By order dated April 5, 2002, this Court granted in part the motion of pro se plaintiff Diane Sank ("Sank") pursuant to Rule 56(f) of the Federal Rules of Civil Procedure and postponed the decision of a summary judgment motion filed by defendants City University of New York ("CUNY"), City

College of the City of New York ("CCNY") and Beverly Sowande ("Sowande") until Sank was able to complete necessary discovery.

Sank has filed this action pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), codified at 42 U.S.C. §§ 2000e et seq., alleging that defendants removed her as chairperson of the Anthropology Department based on her gender, race, religion, and age, and retaliated against her after she filed a complaint of discrimination with the New York City Human Rights Commission. Sank also alleges a violation of New York's Freedom of Information Law ("FOIL"), N.Y. Pub. Officers L. § 84 et seq., and breach of contract.

The April 5, 2002 order dismissed Sank's breach of contract claim and dismissed her FOIL claim inasmuch as she was seeking relief other than prospective injunctive relief. The Court declined to rule on the defendants' summary judgment motion with regard to the Title VII claim, however, as it was unclear from the

[page2]

pleadings and earlier argument that Sank had received all the discovery necessary to oppose the motion.

For the purposes of determining what discovery remained to be produced, a pretrial conference was held on April 10, 2002. Both defendants and Sank expressed frustration -- the defendants at having to produce more information than they have already produced over the span of this eight-year-old case, and Sank at still not receiving what she feels she needs to make her case.

The discovery already produced is instructive. Michael D. Solomon, the Associate General Counsel for Faculty, Staff and Student Relations in the Office of General Counsel and Vice Chancellor for Legal Affairs at CUNY ("Solomon"), has overseen Sank's document discovery against CUNY and CCNY in this lawsuit. He submitted an affidavit dated

December 20, 2001, detailing the documents produced to Sank. The following comes from this affidavit.

By order of the Court dated October 4, 2001, Sank (and her son, Brian Firschein) was given until December 4, 2001, to access the personnel records of current and past CCNY employees for the limited purpose of reviewing, copying, or recording information pertaining to an "employee's hiring date, separation date, race, gender, and current (or last known) address."

[page 3]

Through December 4, 2001, Sank submitted eight separate requests with lists of names, totaling approximately 457 names, as follows: November 4, 2001, 78 names; November 6, 2001, 58 names; November 8, 2001, 171 names; November 13, 2001, 48 names; November 26, 2001, 4 names; November 27, 2001, 41 names; November 28, 2001, 42 names; and November 30, 2001, 15 names. Sank obtained these names by reading through the minutes from Board of Trustees' meetings during the relevant time period. The minutes document the names (without other requested information, such as race and gender) of persons seeking and receiving distinguished professorships, leave, and administrative positions.

CCNY compiled, organized and alphabetized the eight separate lists into a master list. After removing 160 duplicate names, CCNY arrived at a list of 297 names.

Five CCNY employees worked on locating and compiling the requested information on the 297 names. Records are kept in three separate rooms, and the employees searched in each room's records for the requested information. The three rooms contain, respectively, active employees' files, former employees' files, and payroll cards. If no payroll card is found, CCNY alleges that the files are either lost, cannot be located, or the individual was not an employee of CCNY (but may have been employed at another CUNY unit). All the

information was set to be provided to Sank by January 11, 2002.

[page 4]

Sank complained in her Rule 56(f) motion that she was not provided with the race and sex of all of the 297 names she had requested information about.

The defendants can only produce what they have in their possession, and they stated at the April 10, 2002 conference that they had given Sank all the information they could locate on the 297 names. Solomon stated in his affidavit that race and sex information is not consistently maintained in the personnel records, even though there is a space for it on at least one form.[1] Because that affidavit and another by defense counsel Steven L. Banks were dated December 20 and 21, 2001, a few weeks before defendants planned to produce all remaining documents to Sank, the defendants should submit an additional affidavit stating that they have produced to Sank all the information she requested about the list of 297 names, or that there are no such records that reveal it.

At the April 10, 2002 conference, Sank also requested the same information about four categories of individuals, as well as for approximately 700 names about which she had previously not requested information. The 700 names presumably come from the Board of Trustee minutes, but were not submitted to the defendants

[1] Solomon also stated that Sank had in fact been provided with race and sex information through the City University Personnel System, which is a computer file. Because Sank still states that she has not received all such information, the computer system presumably also does not contain the required information.

[page 5]

before the discovery cut-off date of December 4, 2001. It is unclear how many duplicates would exist among the four categories, the 700 names, and the 297 names that have already been produced in part. Given the 160 duplicates in

Sank's most recent eight lists of names, there are certain to be some. While mindful of the fact that Sank is proceeding pro se, this request cannot be granted.

The end of discovery was set for December 4, 2001. Sank failed to supply the defendants with the 700 additional names by that time. This lawsuit has stretched for almost eight years, and it is time to end discovery, continue on to summary judgment and, if warranted, a trial on the merits.

Conclusion

Defendants will produce to Sank within thirty (30) days of this opinion any required information on the 297 names they have not yet supplied and an affidavit to the effect that they have supplied to Sank all the required information on the 297 names. If the defendants have not supplied and cannot supply all the required information on any of the 297 names, they should instead produce an affidavit stating (1) that they have supplied all the required information for each of the 297 names not discussed in the affidavit, and (2) for each of the remaining names, a statement to the effect that they do not have the information or cannot reasonably locate it.

[page 6]

Upon receipt of the affidavits and information, Sank will have thirty (30) days to respond to the defendant's motion for summary judgment with respect to her Title VII claim. At that time, the Court will consider the defendant's summary judgment motion on submission.

It is so ordered.

New York, NY
April 12, 2002

/s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

FILED: April 15, 2002
CITATION: *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 6253 (S.D.N.Y. 4/15/2002)

(3) Supreme Court, U.S
FILED

04 672 NOV 15 2004

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States
October Term, 2004

DIANE SANK,

Petitioner,

v.

THE CITY UNIVERSITY OF NEW YORK, ET AL,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

APPENDIX B, pp. 111a-200a
TO PETITION FOR WRIT OF CERTIORARI

Diane Sank
Petitioner *Pro Se*
173 Charlotte Place
Englewood Cliffs, NJ 07632
(201) 569-7297

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
DIANE SANK,

Plaintiff,

- against -

OPINION
94 Civ. 0253 (RWS)

THE CITY UNIVERSITY OF
NEW YORK, JOSEPH MURPHEY,
et al.,

Defendants.
----------X

APPEARANCES:

DIANE SANK
Plaintiff [Pro Se]
173 Charlotte Place
Englewood Cliffs, NJ 07632

MARSHA RUBIN
G. OLIVER KOPELL
Attorney General of the State of New York
Attorney for Defendants
120 Broadway
New York, NY 10271
By Marsha Rubin

[page 2]

Sweet, D.J.,

Defendants City University of New York ("CUNY"), City College of the City of New York ("CCNY") and Beverly Sowande ("Sowande") have moved pursuant to Rule 56 of the

Federal Rules of Civil Procedure for summary judgment and pursuant to Fed. R. Civ. P. 39(a) to strike the jury demand of Plaintiff Diane Sank ("Sank "). Sank cross moved under Fed. R. Civ. P. 56(f) to deny or postpone the summary judgment motion until she is able to complete necessary discovery.

Sank has filed this action pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), codified at 42 U.S.C. §§ 2000e et seq., alleging that defendants removed her as chairperson of the Anthropology Department based on her gender, race, religion, and age, and retaliated against her after she filed a complaint of discrimination with the New York City Human Rights Commission. Plaintiff also alleges a violation of New York's Freedom of Information Law ("FOIL"), N.Y. Pub. Officers L. § 84 et seq., and breach of contract.

For the reasons below, Sank's Rule 56(f) motion is granted as to her Title VII claims, but denied as to her other

[page 3]

claims. As to the other claims, the defendants' motion for summary judgment is granted. The defendant's Rule 39 (a) motion is also granted.

Parties

Pro se plaintiff Sank is a white Jewish woman, over the age of 66, who walks with the aid of a cane and uses a wheeled luggage cart due to a disability resulting from an accident in 1985. Sank is a Professor of Anthropology who has been employed by CCNY since 1968. Sank is a resident of New Jersey and a citizen of the United States.

CUNY is a public higher education system comprised of several senior and community colleges throughout New York City and its boroughs.

CCNY is one of the colleges that makes up CUNY.

Sowande, Associate Counsel in CUNY's General Counsel's Office, was the CUNY Freedom of Information Appeals Officer.

[page 4]

Facts

The facts below are drawn from the plaintiff's complaint, the defendants' summary judgment motion and previous opinions of this Court. Plaintiff has not yet submitted a statement of undisputed facts, and the facts below are not limited to undisputed facts.

From 1969 to 1972, Sank served as chairperson of the CCNY Anthropology Department (the "Department"). After her term, faculty members Eleanor Leacock and June Nash each served as chairperson for alternate terms from 1972 to 1987. Both Leacock and Nash are white females.

Early in 1987, Dr. Charlene McDermott, the provost of CCNY, initiated a college-wide review of departments, including the Department. As part of this process, Sank and other members of the Department selected two outside anthropologists to evaluate the Department in December 1987.

In May 1987, the six full-time faculty members of the Department elected Sank to a three-year term as departmental chairperson. Plaintiff's salary did not change as a result of her election. Instead, Sank received a reduction in her teaching

[page 5]

duties in order to accommodate the administrative functions the chairperson was required to perform. Sank claims that prior to the election CCNY President Bernard W. Harleston ("Harleston") threatened to shut down the Department because

it contained no black faculty, and that she was elected to address this issue.

On December 3 and 4, 1987, the two outside anthropologists, Professor Owen Lynch of New York University and Professor William Pollitzer of the University of North Carolina, toured the Department. Sank organized the visit, escorting the reviewers through the library and facilities and scheduling interviews between the reviewers and each faculty member.

Lynch and Pollitzer released a report on January 13, 1988 (the "Report") based on their observations at CCNY. They stated:

> Unfortunately, and perhaps in part because of their individual accomplishments, the members of the department are unable to cooperate and govern themselves. Over the years mutual distrust has grown because of personal misunderstandings, misinterpretations, and misperceptions of the interests and intentions of one another. During her tenure, Prof. Leacock was able to hold these problems in check and was a focus whom all respected and trusted. Her departure left the department to its own self-destructive devices. Unable to govern itself it turned to Prof. Sank to rescue it by electing her Chair. Unfortunately, immediately after her election she, too, being a member of the family, became a victim of its collective neurosis. Despite her sincere efforts to create a new morale, to
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> [page 6]
>
> promote student enrollment and department publicity, to seek from the administration added funds, and to write the departmental assessment for our review, the department which elected her withdrew its collective

support. Without that support it has been impossible for her to accomplish anything and she had been reduced to a symbol of the department's collective malaise. The responsibility for the department's present distemper, disarray, and drift is that of the department as a whole.

The reviewers proposed "an immediate, but interim, solution of semi-receivership for the department." They recommended that an anthropologist from CUNY's Graduate Center be appointed as an interim chairperson with responsibility for initiating a search for an outside educator to serve as chairperson. The Report specifically identified Professors Dell Jones ("Jones") and Jane Schneider ("Schneider") from the CUNY Graduate Center and Professor Lucie Saunders ("Saunder") from Lehman College as good candidates for the interim post. Jones is a black male; Schneider and Saunders are white females.

On February 8, 1997, the Department held a special faculty meeting to discuss the findings and recommendations set forth in the Report. The meeting ended without a clear consensus on an appropriate course of action. However, three of the six faculty members (Professors Fremont Besmer ("Besmer"), Warren Kinzey ("Kinzey"), and June Nash ("Nash")) voted to recognize the "immediate need for outside advisory input to the Department,"

[page 7]

and recommended that "Prof. Dell Jones be, or be among those who provide, that advising input."

The Department later submitted two separate responses to the Report to the CCNY Provost. Sank submitted the official response on February 16, 1988. It recognized the division in the anthropology faculty but concluded that a semi-receivership would be "an illegal, dangerous precedent and is unwarranted." Four of the six faculty members submitted a

separate memorandum to the CCNY Provost, recommending that Jones immediately replace Sank as chairperson.

Harleston subsequently met with the Department to discuss the proposal to appoint a new chairperson. Three of the five faculty members present voiced their approval of the recommendation. Plaintiff and Professor Arthur Spears dissented. Nash, who had supported Sank's removal in the February 18, 1998 response to the Report, was not present at the meeting.

On April 27, 1988, Harleston wrote to Joseph Murphy, the CUNY Chancellor at the time, stating his decision to remove Sank as chairperson effective June 1, 1988 and to recommend that the Board of Trustees appoint Jones as acting chairperson for the period from June 1, 1988 through August 31, 1989. Harleston sent

[page 8]

a separate letter to Sank informing her of his decision. In 1988, the CUNY By-laws permitted CCNY's president to remove a departmental chairperson "as the interests of the college may require" after conferring with members of the department. Sank claims that this incident was the first time in CCNY's history that a department chair was removed, rather than quietly asked to resign.

On May 11, 1988, the office of the Ombudsman at CCNY wrote to Harleston expressing surprise at his having taken action with respect to Sank prior to meeting with the Ombudsman. That letter announced a May 18, 1988 faculty meeting to consider the matter of the President's actions with respect to Sank and the Department.

Sank promptly pursued administrative remedies complaining about her removal. After being informed in a letter dated May 24, 1988 that the Professional Staff Congress

of CCNY would not take the complaint to grievance because "it lacked merit," Sank filed a Step One Grievance against Harleston, the Provost, and the Dean of Social Science of CCNY for improperly removing her as Department chair. This letter did not mention

[page 9]

allegations of discrimination.[1]

Sank filed a complaint with the New York City Human Rights Commission in late August 1988 (the "Commission"). On October 21, 1989, Sank filed a verified complaint with the Commission charging CUNY, CCNY and Harleston with sex discrimination. A copy of the verified complaint was filed with the Equal Employment Opportunities Commission ("EEOC") on September 12, 1989 for dual filing purposes.

On October 13, 1988, Sank was informed by letter that her grievance had been rejected. On December 9, 1988, Sank received a letter from the CCNY Acting Director of Affirmative Action advising her that "the Grievance Committee has not found a basis for your grievance of gender discrimination."

On June 8, 1989, the Department held a meeting to elect a new Chairperson, as Jones declined reappointment. The vote was to appoint Besmer, a white male.[2]

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[1] A September 15, 1988 letter from Sank to the CCNY Dean of Faculty and Staff Relations makes reference to her enclosure of a report on The Status of Women and Faculty Appointment at CUNY.

[2] There was a lack of an appropriate quorum however. The lack of quorum was successfully challenged through the University grievance process. In September Besmer was properly appointed.

[page 10]

On June 27, 1989, Sank filed an amendment to her verified complaint with the Commission, adding charges of race discrimination.

On July 13, 1989, as part of a campus wide modernization project,[3] the architect in charge, Anthony Rodriguez ("Rodriguez")[4] issued a memorandum setting forth a schedule for the reallocation of a significant amount of space within seven buildings at CCNY. As part of this reallocation of space, the Department lost the use of two rooms to the Department of Computer Science, including the room housing the plaintiff's research laboratory ("NAC 7/105"). According to the memorandum, the contents of NAC 7/105 and NAC 7/106, the other room lost by the Department, were to be packed and moved into NAC 7/103, a remaining Department room, on July 23-24, 1989. At the time Rodriguez issued the memorandum, he claims he did not know Sank and had no knowledge of her claims of discrimination.

[3] As part of the project, the college was forced to vacate between 400,000 and 500,000 square feet, or approximately 20 to 25 % of the total campus space of two million square feet.

[4] Rodriguez made the ultimate decision on space allocation. However, he would routinely report his recommendations to the Space Advisory Committee, comprised of deans, faculty members, and administrative employees. The role of the committee was to provide Rodriguez with feedback and to keep the CCNY community informed of the renovation progress.

[page 11]

Besmer, as acting chairperson, sent Sank a memorandum dated July 20, 1989 notifying her of the impending move. Sank testified that she received the letter, at her house, on July 27, 1989 - after the contents of her laboratory had already been packed and moved across the hall into NAC 7/103. She claims that the laboratory contained invaluable, irreplaceable contents, many of which were her own personal property. Further, she claims that a 1989-90

faculty investigation determined that the administration did not have to take and should not have taken her laboratory.

Sank was offered assistance to recreate her laboratory in NAC 7/103. Sank did not recreate it, however, and in 1991, the Department permitted Kinzey to set up a laboratory there.

On August 8, 1989, Sank again amended the complaint to allege the retaliatory seizure and dismantling of her laboratory in July 1989. She named Rodriguez as a person with whom she discussed the dismantling and stated that "he refused to give me back my lab room, even though there are alternative rooms to use for other departments." Correspondence between Sank and the Commission and Rodriguez and Sank discuss his role in the decision to move her lab. Rodriguez was not added to the caption. (In the Court Complaint, Sank alleges he, along

[page 12]

with three school officials, were all responsible for the retaliatory actions and her failure to be warned of the same.)

On March 3, 1990, she amended the Commission Complaint to add Besmer, the new Department Chair, who Sank alleges threatened to take her research computer for his own use. Sank alleged in her Commission Complaint that Besmer's actions were his way of thanking Harleston for appointing him as acting Chair.

Throughout and after the period she was filing and amending her Commission complaint, Sank sought information through FOIL from CCNY and CUNY officials. The first letter request was on June 9, 1988, and the last on January 2, 1992.

On July 24, 1991, the Investigator at the Commission indicated on a file memorandum regarding Sank's complaint

that there was probable cause and forwarded the complaint to the Commission's Enforcement Bureau.

The Commission issued a written determination and order on January 22, 1993, finding "no probable cause to believe that respondents engaged in the unlawful discriminatory practices charged . . . ." Sank unsuccessfully appealed the Commission's decision to the EEOC, which, according to the Complaint,

[page 13]

rejected the appeal without explanation.

On October 19, 1993, the EEOC issued a determination concurring with the conclusions of the Commission and granting Sank the right to sue within 90 days.

Sank filed her complaint in this Court on January 18, 1994, and an amended complaint (the "Complaint") was filed on May 27, 1994. By decision dated May 23, 1995, this Court granted, in part, defendants' motion pursuant to Fed. R. Civ. P. 12(b)(1), dismissing (1) plaintiff's claims of discrimination based on age, religion, and disability, (2) plaintiff's Title VII claims against Sowande and the CUNY Board of Trustees, and (3) all of plaintiff's claims under 42 U.S.C. § 1983. Sank v. CUNY, 1995 U.S. Dist. LEXIS 7021, No. 94 Civ. 0253, 1995 WL 314696 (S.D.N.Y. May 24, 1995). Plaintiff's motion for reconsideration of the May 23, 1995 decision was denied. Sank v. CUNY, 1997 U.S. Dist. LEXIS 1468, No. 94 Civ. 0253, (S.D.N.Y. Feb. 13, 1997).

Subsequently, individual defendants moved to dismiss the Title VII claims against them in light of the Second Circuit's holding in Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995). This motion was granted on June 25, 1997. Sank v. CUNY, 1997 U.S. Dist. LEXIS 9045, 1997 WL 362150 (S.D.N.Y. June 26, 1997).

[page 14]

Accordingly, the only claims remaining in this action are (1) Title VII claims against CUNY and CCNY for gender and race discrimination and retaliation; (2) a state FOIL claim against defendant Sowande; and (3) a state contract law claim against CUNY and CCNY.

Defendants filed the instant motion on April 13, 2001. They allege that plaintiff has failed to present evidence from which a trier of fact could infer a violation of her rights under Title VII and that this Court lacks subject matter jurisdiction over plaintiff's state law claims. Finally, should plaintiff 's claim survive summary judgment, the Defendants claim plaintiff has no right to trial by jury or recovery of monetary damages or back pay.

A discovery dispute arose in the fall, and on October 9, 2001, this Court ordered that, "Defendant shall permit plaintiff and her son, Brian Firschein, to access and review the personnel records of current and past employees of the City College of the City University of New York during regular business hours in the presence of a City College employee. However, in accessing these personnel records, plaintiff may only review, copy or record information pertaining to an employee's hiring date, separation date, race, gender, and current (or last

[page 15]

known) address." Order, October 9, 2001.

Following this Court's order, Sank's access to personnel records was limited to four specific dates (two of which were concurrent with classes Sank was teaching, as CCNY would have knowledge of); for a duration of three hours or less; and in a room that was used for other purposes and thus not available during other regular hours. Moreover, pursuant to the Order, Sank could only review records in the

presence of a City College administrative employee. That employee was often unavailable, further limiting Sank's access to personnel records.

In addition to these limitations, defendants did not produce all the documents that they were ordered to produce. Some of the personnel records lacked any specification of race or gender - both of which are integral to Sank 's contentions in this case. In at least one instance, data relating to several different employees was commingled in a single folder - despite the fact that the defendants are very unlikely to have kept the records that way in the ordinary course of business. Sank requested more of the materials from a school official, who has yet to comply with most of those requests.

On November 26, 2001, plaintiff filed a declaration in
[page 16]
support of a motion under Rule 56(f) to deny or postpone summary judgment. The motion was deemed fully submitted on February 27, 2002.

Standard of Review

Rule 56(e) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits . . . show that there is no genuine issue as to material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Silver v. City Univ., 947 F.2d 1021, 1022 (2d Cir. 1991). "The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish her right to judgment as a matter of law." Rodriguez v. City of New York, 72 F.3d 1051, 1060-61 (2d

Cir. 1995). In determining whether a genuine issue of material fact exists, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); Gibbs-Alfano v. Burton, 281 F.3d 12, 18 (2d Cir. 2002).

[page 17]

Discussion

I. Sank's Motion Under Rule 56(f).

In addressing the present motion, the Court is mindful that the plaintiff is proceeding pro se and that her submissions should be held "'to less stringent standards than formal pleadings drafted by lawyers. . . .'" Hughes v. Rowe, 449 U.S. 5, 9, 101 S. Ct. 173, 176, 66 L. Ed. 2d 163 (1980) (per curiam) (quoting Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 595, 30 L. Ed. 2d 652 (1972)); see also Ferran v. Town of Nassau, 11 F.3d 21, 22 (2d Cir. 1993). The Court recognizes that it must make reasonable allowances so that a pro se plaintiff does not forfeit rights by virtue of lack of legal training. Traguth v. Zuck, 710 F.2d 90, 94 (2d Cir. 1983).

Indeed, district courts should "read the pleadings of a pro se plaintiff liberally and interpret them to raise the strongest arguments they suggest.'" McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999) (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994). Nevertheless, the Court is also aware that pro se statute "'does not exempt a party from compliance with relevant rules of procedural and substantive law." Traguth, 710 F.2d at 95 (quotations omitted).

[page 18]

Sank has filed a declaration under Fed. R. Civ. P. 56(f) seeking an order denying defendants' motion for summary judgment and compelling defendants to provide certain discovery. That rule states that:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Courts have interpreted Rule 56(f) to provide that when a party facing an adversary's motion for summary judgment reasonably advises the court that it needs discovery to be able to present facts needed to defend the motion, the court should defer decision of the motion until the party has had the opportunity to take discovery and rebut the motion. Commercial Cleaning Servs, L.L.C. v. Colin Serv. Systems, Inc., 271 F.2d 374, 386 (2d Cir. 2001) (citing Meloff v. New York Life Ins. Co., 51 F.3d 372, 375 (2d Cir. 1995) (holding that grant of judgment was premature where plaintiff submitted properly supported Rule 56(f) request for further discovery in opposition to defendant's motion for summary judgment); Hellstrom v. U.S. Dep't of Veterans Affairs, 201 F.3d 94, 97 (2d Cir. 2000) ("Only in the rarest cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct

[page 19]

discovery.")). The district court is afforded discretion in making this decision. Id.

The Second Circuit has established a four-part test to determine the sufficiency of an affidavit or declaration submitted pursuant to Rule 56(f). The affidavit or declaration must detail: (1) the nature of the uncompleted discovery; (2) how the facts sought are reasonably expected to create a genuine issue of material fact; (3) what efforts the affiant as

made to obtain those facts; and (4) why those efforts were unsuccessful. Paddington Partners v. Bouchard, 34 F.3d 1132, 1138 (2d Cir. 1994); Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy, 891 F.2d 414, 422 (2d Cir. 1989).

Sank alleges that defendants have obstructed her ability to access personnel records for several hundred employees of CUNY for whom she seeks information regarding their hiring dates, race, gender, and current addresses. She also alleges that defendants interfered with her ability to depose Harleston. Defendants claim that they have provided Sank with the material she requested and that she is bound by the discovery requests of her former attorney.

A. Actions of Sank's Former Attorney

Defendants argue that Sank should be bound by the discovery requests by her former attorney.

It is true that clients are bound by the acts or omissions of their attorneys. Pioneer Investment Serv. Co. v. Brunswick, 507 U.S. 380, 397, 123 L. Ed. 2d 74, 113 S. Ct. 1489 (1993) (citing Link v. Wabash R. Co., 370 U.S. 626, 633, 8 L. Ed. 2d 734, 82 S. Ct. 1386 (1962)) (finding that clients are bound by their attorney's omission in not filing a claim under bankruptcy law); United States v. Cirami, 535 F.2d 736, 741 (2d Cir. 1976) (affirming summary judgment against client despite claims of attorney misconduct); Trehern v. OMI Corp., 1999 U.S. Dist. LEXIS 919, at *9, No. 98 Civ. 0242 (S.D.N.Y. Feb. 1, 1999) (denying plaintiff's motion for change of venue where he claimed that he did not know that his former attorney had filed suit in New York).

As discussed below, Sank seeks only discovery that she herself has already requested[5] and that this Court has already

[5] As early as September 1997, while prosecuting the action pro se, Sank requested "the race and gender of certain administrators and faculty personnel at City College, their qualifications (e.g. as indicated by their curriculum vitaes), as well as their titles and faculty ranks, status (permanent or acting), dates of appointment, promotion, permitted leave(s), and (if applicable) resignation/termination from their positions (as well as the reasons therefor, if known), and any changes therein, as well as the names of the officials who made each such appointment, promotion, etc." Sank letter, October 22, 2001.

[page 21]

ordered.[6] The actions of her former attorney, and the extent to which they bind her, are not at issue. What is at issue is whether the defendants have complied with this Court's October 9, 2001 order so that Sank could fairly respond to their motion for summary judgment.

B. Deposing Harleston

Sank complained in her cross motion of defendants' obstructions to her deposition of Harleston. Because Sank has taken that deposition, this issue is moot.

C. Personnel Records

It does not appear as though Sank has had a reasonable opportunity to obtain access to personnel records that she had requested and that this Court ordered made available to her.

On October 9, 2001, this Court ordered that the

6 On October 9, 2001, This Court ordered that "Defendant shall permit plaintiff and her son, Brian Firschein, to access and review the personnel records of current and past employees of the City College of the City University of New York during regular business hours in the presence of a City College employee. However, in accessing these personnel records, plaintiff may only review, copy or record information pertaining to an employee's hiring date, separation date, race, gender, and current (or last known) address." Order, October 9, 2001.

[page 22]

defendants allow Sank and her son access to personnel records. The defendants allowed Sank the ordered access, but for such constricted periods of time that she did not have sufficient time to complete her discovery. In effect, Sank had two three-hour periods, on different days, when she could sift through records. In addition, some of the personnel records lacked any specification of race or gender - both of which are integral to Sank's contentions in this case. In at least one instance, data relating to several different employees was commingled in a single folder - despite the fact that the defendants are very unlikely to have kept the records that way in the ordinary course of business. Sank has requested more of the materials that defendants were ordered to produce from a school official, who has yet to comply with most of those requests.

Defendants claimed in a memorandum dated December 21, 2001, that Sank should have had access to the materials as of January 11, 2002. Sank's sur-reply to this memorandum is dated February 25, 2002. In it, she states that "Defendants have yet to make available to me the actual personnel files for any of the individuals I have been able to identify . . . ." Pl.'s Sur-Reply at 5. She also lists other documents that defendants have still failed to produce.

Access to these personnel materials would be integral

[page 23]

to Sank's preparing a defense to the defendants' motion for summary judgment on Sank's Title VII claims.[7] She disputes the fact that the decision to remove her from her chairpersonship was not based on any illegitimate factors. The records she seeks could aid her argument in that regard. For instance, Sank claims that no one else in the history of CCNY had ever been removed as Chair (rather than asked to resign). These records could support or rebut that contention. In

addition, she claims that CCNY impermissibly promoted persons on the basis of race and sex; she can only support her contentions by determining the races and sexes of persons who received appointments.

Therefore, summary judgment on the matter of Sank's Title VII claims will be dismissed. A pre-trial conference will be held to address the specifics of Sank 's remaining request and clarify what records are available and what records Sank seeks.

However, defendants' arguments regarding the Eleventh Amendment and FOIL do not rely on these disputed issues of material fact. Therefore, the Court will address the other contentions.

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[7] Defendants argue that Sank, a pro se plaintiff, did not "state with clarity" what additional facts she sought or why they would raise a genuine issue of material fact. Defs.' Mem. at 3. However, reading her submission liberally and interpreting it to raise the strongest arguments it suggests, the Court finds that Sank did address these aspects. McPherson, 174 F.3d at 280.

[page 24]

II. The Eleventh Amendment Bars Sank's Breach of Contract Claim.

The Eleventh Amendment limits the ability of federal courts to entertain suits brought against the states, regardless of the relief sought, unless the state consents to be sued, or Congress enacts legislation overriding the state's Eleventh Amendment immunity. Papasan v. Allain, 478 U.S. 265, 276, 92 L. Ed. 2d 209, 106 S. Ct. 2932 (1986); Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984).

It has been established that CUNY's senior colleges are arms of the State entitled to Eleventh Amendment immunity. Hester-Bey v. New York City Technical College, 2000 U.S.

Dist. LEXIS 5323, at *11, No. 98 Civ. 5129 (E.D.N.Y. March 24, 2000) (holding that because senior colleges are "funded and administered by the State to a great degree," they constitute an arm of the State and are immune from suit under the Eleventh Amendment); see also Becker v. CUNY, 94 F. Supp. 2d 487, 490 (S.D.N.Y. 2000) (holding that CUNY's central administration, like CUNY's senior colleges, possesses Eleventh Amendment immunity as an arm of the State). Thus defendants CUNY and CCNY are entitled to Eleventh Amendment immunity.

This does not end our inquiry, however. The State may nonetheless consent to suit in the federal courts. If it does

[page 25]

not, however, this Court cannot hear Sank 's claims. A number of courts have held that the State has not consented to suit for breach of contract claims and thus held that federal courts lacked jurisdiction to hear breach of contract claims against state entities, including CUNY. E.g., Burrell v. CUNY, 995 F. Supp. 398, 415 (S.D.N.Y. 1998); Jungels v. SUNY, 922 F. Supp. 779, 787 (W.D.N.Y. 1996).

The Burrell court also made the instructive point that, even if the Eleventh Amendment did not exist, this court could not entertain jurisdiction of a breach of contract claim against one of New York's "senior colleges." The New York Court of Claims has exclusive jurisdiction over such claims. N.Y. Educ. Law § 6224(4); see also Illickal v. Roman, 236 A.D.2d 247, 248, 653 N.Y.S.2d 562, 563 (1st Dep't 1997) (dismissing breach of contract claim against medical school).

The breach of contract claim therefore is dismissed.

III. The FOIL Claim Is Dismissed in Part

Sank's claim against Sowande does not face the same Eleventh Amendment bar discussed above. However, FOIL claims are limited to seeking injunctive, rather than monetary relief, through a specified procedure in the state courts.

[page 26]

The Eleventh Amendment does not bar State law claims against State officials in their individual capacities that seek money damages or prospective injunctive relief. Huang v. Johnson, 251 F.3d 65, 70 (2d Cir. 2001); Dwyer v. Regan, 777 F.2d 825, 835 (2d Cir. 1985). Sank sued Sowande "individually and in her official capacity . . . ." Amended Compl. at 2. Therefore, the Eleventh Amendment presents no bar to Sank's claim against Sowande in her individual capacity for money damages or for prospective injunctive relief.

As with the breach of contract claim above, however, the Eleventh Amendment is not the only hurdle Sank has to clear. FOIL does not give rise to a private cause of action to recover money damages. Warburton v. State, 173 Misc. 2d 879, 881-82, 662 N.Y.S.2d 706, 708 (N.Y. Ct. Cl. 1997). In the event that access to a record is denied, the affected person may bring a C.P.L.R. Article 78 proceeding, and may be awarded reasonable attorney's fees and litigation costs. Id. Criminal sanctions may also ensue. Id. "Here, the Legislature has given a civil remedy by way of an article 78 proceeding with counsel fees and court costs available, as well as a criminal sanction. To go beyond those remedies and create a private cause of action for money damages for a violation of FOIL would be an improper usurpation of the legislative function, a step the Court declines to take." Id.

[page 27]

It is unclear what remedy Sank seeks from Sowande. She may only seek injunctive relief pursuant to FOIL, and the Eleventh Amendment limits the injunctive relief she can obtain to prospective relief. Thus, to the extent that Sank seeks

something other than prospective injunctive relief against Sowande, this claim is dismissed.

IV. Trial by Jury and Money Damages

Prior to the enactment of the Civil Rights Act of 1991 ("1991 Act"), plaintiffs bringing claims of discrimination under Title VII were limited to equitable relief - typically reinstatement and back pay - and were not entitled to a jury trial. Patterson v. McLean Credit Union, 491 U.S. 164, 182, n. 4, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989); see also 105 Stat. 1071-80 (1991).

In Landgraf v. USI Film Prods., 511 U.S. 244, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994), the Supreme Court addressed the issue of whether those provisions of the 1991 Act authorizing recovery of compensatory and punitive damages, as well as trial by jury, for Title VII claims applied to cases pending when it became law. Landsgraf, 511 U.S. at 249-50. The Court held that the provisions were not retroactive. Id. at 286. Accordingly, Title VII plaintiffs cannot recover compensatory or punitive damages for events arising before

[page 28]

November 21, 1991, the effective date of the 1991 Act. Id. at 283, 286; Joseph v. New York City Bd. of Educ., 171 F.3d 87, 91 (2d Cir. 1999).

The latest conduct that Sank complained of occurred in 1990. Plaintiff therefore is not entitled to a trial by jury or an award of compensatory or punitive damages for her Title VII claim. Moreover, with respect to Sank's claims for injunctive relief, it is undisputed that she suffered no loss of wages or other pay as result of her removal as department chairperson. She is therefore not entitled to an award of back or future pay.

Conclusion

For the foregoing reasons, the plaintiff's Rule 56 (f) motion is granted in part and denied in part; the defendants' motion for summary judgment is granted in part and denied in part; and the defendants' Rule 39 (a) motion is granted. A pre-trial conference is ordered for April 10, 2002, at noon, in Courtroom 18-C, to discuss Sank's remaining discovery requests.

It is so ordered.

/s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

Dated: New York, New York
April 2 2002

FILED: April 5, 2002
CITATION: *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 5928 (S.D.N.Y. 4/5/2002)

LETTER MEMO FOR CERTIFICATION OF *TOMKA* ISSUE WITH HANDWRITTEN ORDER DENYING REQUEST

/HANDWRITTEN ORDER/ *Treating this letter as a motion to reargue or to certify an appeal from the June 25, 1997 order of the court, it is denied with trial anticipated as directed in the fall of 1997. It is so ordered. /signed/ J Sweet USDJ 7-14-97*

Prof. Diane Sank
173 Charlotte Pl.
Englewood Cliffs, N.J. 17632
(201) 567-7925

July 7, 1997

BY FAX: (212) 805-7925

Honorable Robert W. Sweet
United States District Court
Southern District of New York
500 Pearl Street, Room 1920
New York, NY 10007

Re: Diane Sank v. The City University of New York, et al., 94 Civ. 0253 (RWS)

Dear Judge Sweet:

Please again excuse my use of a letter format and your fax facilities to deliver this to you, but since there is little time for me to (subsequent pages omitted as irrelevant to this Petitioner's Writ)

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
DIANE SANK,

Plaintiff,

- against -

OPINION
94 Civ. 0253 (RWS)

THE CITY UNIVERSITY OF
NEW YORK, et al.,

Defendants.
----------X.

APPEARANCES:

PROF. DIANE SANK
Plaintiff Pro Se
173 Charlotte Place
Englewood Cliffs, NJ 07632

HON. DENNIS C. VACCO
Attorney General of the State of New York
Attorney for Moving Defendants
120 Broadway
New York, NY 10271
By MARSHA RUBIN, Assistant Attorney General
Of Counsel

[page 1]

Sweet, D.J.,

The individual defendants, former Chancellor Joseph Murphy, Chancellor W. Ann Reynolds, and the individual members of the Board of Trustees of the City University of New York ("CUNY"), as constituted through the years 1988 through1990, have moved on the authority of Tomka v. Seiler Corp., 66 F.3d 1295 (2dCir. 1995), to dismiss the claims of

pro se plaintiff Diane Sank ("Sank")against remaining individual defendants alleging sex and race discrimination and retaliation in connection with Sank's demotion. For the reasons set forth below,the motion is granted, and a discovery and trial schedule is determined.

Parties

Pro se plaintiff Sank is a white Jewish woman, over the age of 66, who walks with the aid of a cane and uses a wheeled luggage cart due to a disability resulting from an accident in 1985. Sank is a Professor of Anthropology who has been employed as such by the City College of the City of New York ("CCNY") since1968. She was the elected Chair of CCNY's Anthropology Department for a three year term beginning on July 1, 1987. She served in that capacity until June 1,1988. Sank is a resident of New Jersey and a citizen of the United States.

[page 2]

Defendant Joseph Murphy ("Murphy") was the Chancellor of CUNY from 1987 to1990.

Defendant W. Ann Reynolds ("Reynolds") replaced Joseph Murphy as Chancellor of CUNY in September 1990.

The Board of Trustees of CUNY and its members in 1988 through 1990 includes all of the individual trustees.

Prior Proceedings

This action was commenced by Sank on January 18, 1994, alleging Title VII and Americans with Disabilities Act violations. By an opinion of May 24, 1995certain of the claims were dismissed for failure to exhaust her remedies before the Equal Employment Opportunities Commission ("EEOC"), and, based on the same reasoning, dismissed Sank's Title VII claims against defendants Dr. Beverly Sowande and the Board of Trustees of the City University of New York (the

"Trustees") for the years of 1991 and 1992. See Sank v. City University of NewYork, 1995 U.S. Dist. LEXIS 7021, 1995 WL 314696 (S.D.N.Y. May 24, 1995) (the "May 24 Opinion"). By order of November 10, 1995 (the "November 10 Order"), theCity Commission of Human Rights defendants were dismissed from the action. By opinion of February 13, 1997, the motion of Sank for reconsideration of the May24 Opinion and the November 10 Order was denied. See Sank v. City University of New York, 1997 U.S. Dist. LEXIS 1468, 1997 WL 65910 (S.D.N.Y. 1997) (the "February 13

[page 3]

Opinion"). On April 4, 1997, Sank's motion for certification of an interlocutory appeal from the February 13 Opinion was denied. Familiarity with these opinions and order is assumed.

On April 8, 1997, the Board of Trustee defendants by letter requested a conference to consider a motion to dismiss Sank's claims against the remaining individual defendants on the grounds of Tomka, supra, as well as Sank's requests for discovery. This was treated as a motion and filed. Sank was granted time to respond to the letter motion, did so, and on May 7, 1997 the motion was considered fully submitted.

The Facts

As more fully set forth in the prior opinions and order, the moving defendants were members of the Board of Trustees during the period of the events which gave rise to Sank's claim. The grievance and the subsequent proceedings including this action arose out of Sank's demotion as the elected Chair of the Anthropology Department of the City College of New York ("CCNY") in 1988, her subsequent removal in 1989, and certain following acts alleged to be retaliatory in nature. Her grievance stemming from her demotion rose to the Board of Trustees and was denied.

[page 4]

Discussion

Tomka Requires the Dismissal of Sank's Title VII Claims Against Individual Defendants

Sank's present outstanding claims are brought in part against individual defendants. The claims allege discrimination based upon sex and race in violation of the provisions of Title VII. in part against individual defendants. However, in Tomka, 66 F.3d at 1313-16, the Second Circuit held that individual defendants, even those with supervisory capacity, could not be held personally liable for alleged violations of Title VII. In Houston v. Fidelity National Financial Services, 1997 U.S. Dist. LEXIS 2366, 1997 WL 97838 (S.D.N.Y. 1997), this Court dismissed Title VII claims against individually named defendants on the authority of Tomka. The Honorable Denny Chin and the Honorable Loretta A. Preska reached similar conclusions in Heitz v. Salant Corporation, 1997 U.S. Dist. LEXIS 251, 1997 WL 13241 (S.D.N.Y. 1997) and Benzo v. NYS Division of Human Rights and CUNY, et al., 1997 U.S. Dist. LEXIS 901, 1997 WL 37961 (S.D.N.Y. 1997), respectively. No meaningful distinction in law has been made between the holdings in these authorities and the instant situation. The complaint against the individual members of the Board of Trustees having supervisory control over Sank will therefore be dismissed, leaving the institutional defendant CUNY.

[page 5]

Further Discovery is Appropriate

Sank has indicated a desire to complete her discovery and such completion is appropriate. Within twenty (20) days she will advise the counsel for the defendant of the requested discovery which will be completed by September 10, 1997. Any disputes will be submitted by letter. The pretrial order will be submitted in the first instance by the defendant to Sank, given her pro se status, on September 17, 1997. Sank will be given two weeks to request any changes, additions or corrections, and the final pretrial order will be filed October 1,

1997. Given the age of this case, further extensions of these deadlines are unlikely.

Counsel Will Be Requested

This order will constitute a request to the Pro Se Office of the Court to seek counsel to represent Sank in view of the trial settings set forth above.

[page 6]

Conclusion

The individual defendants' motion to dismiss Sank's Title VII claims is granted. Discovery will proceed according to the schedule set forth above.

It is so ordered.

/s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

New York, N. Y.
June 25, 1997

FILED: June 26, 1997
CITATION: *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 9045 (S.D.N.Y. 6/26/1997)

Stamped
PRO SE OFFICE

Stamped
U.S. DISTRIC COURT
FILED
MAR 17 1997
S. D. N. Y.

Stamped
RECEIVED
MAR 20 1997
JUDGE SWEET CHAMBERS

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RECEIVED
1997 MAR 17 P 10: 19
U.S. DISTRICT COURT
SDNY

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

DIANE SANK,

Plaintiff,

- against -

THE CITY UNIVERSITY OF NEW YORK, et al.,

Defendants.

NOTICE OF MOTION FOR LEAVE TO FILE AND CERTIFICATION OF A SECTION 1292 INTERLOCUTORY APPEAL OF THE COURT'S FEBRUARY 11, 1997 OPINION

94 CIV 0235 (RWS)

----------X

S I R S / M A D A M S:

PLEASE TAKE NOTICE, that, upon the annexed affidavit of Certification of an Interlocutory Appeal from the Court's February 11, 1997 Opinion.

/HANDWRITTEN DECISION/ *Motion denied. Requested appeal will not expedite the disposition of this action nor are the issues such as to meet the requirements of §1292. /signed/ J Sweet USDJ 4-4-97*

Papers, if any, must be served upon the undersigned no later than seven days prior to the return date of this motion.

Dated: 3-17-97 (Bergen County), New Jersey
(date) March 17, 1997

/s/ Diane Sank

Diane Sank
Plaintiff Pro Se
173 Charlotte Pl.
Englewood Cliffs,
New Jersey 09632

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
DIANE SANK,

Plaintiff,

- against -

OPINION
94 Civ. 0253 (RWS)

THE CITY UNIVERSITY OF
NEW YORK, et al.,

Defendants.
----------X.

APPEARANCES:

PROF. DIANE SANK
Plaintiff Pro Se
173 Charlotte Place
Englewood Cliffs, NJ 07632

HON. DENNIS C. VACCO
Attorney General of the State of New York
Attorney for Moving Defendants
120 Broadway
New York, NY 10271
By MARSHA RUBIN, Assistant Attorney General
Of Counsel

[page 1]

Sweet, D.J.,

Plaintiff Diane Sank ("Sank") has moved pursuant to Rule 60(b), Fed. R. Civ. P., for reconsideration of this Court's Opinion dated May 24, 1995 (the "May Opinion") and this Court's order dated November 10, 1995 (the "November Order").

For the reasons set forth below, the motions will be denied.

Background

The parties, facts and prior proceedings are fully set forth in a prior opinion of this Court, Sank v. City University of New York, 1995 U.S. Dist. LEXIS 7021, 1995 WL 314696 (S.D.N.Y. May 24, 1995), familiarity with which is assumed. The May Opinion dismissed Sank's claims for discrimination based on age, religion and disability because those claims had not been raised in Sank's administrative filings and the Court therefore lacked subject matter jurisdiction over those claims. The May Opinion also dismissed, based on the same reasoning, Sank's Title VII claims against Defendants Dr. Beverly Sowande ("Sowande") and the Board of Trustees of the City University of New York (the "Trustees") for the years of 1991 and 1992. Finally, the May Opinion held that relief under 42 U.S.C. § 1983 was time-barred by the three-year statute of limitations governing such claims.

[page 2]

By Decision and Order dated November 10, 1995, the Court dismissed Sank's claims against defendants the New York City Commission on Human Rights (the "Commission"), Dennis de Leon, Stephanie Orteleiva, Lizbeth Schalet and Rudolph Will (collectively, the "Commission Defendants") on qualified immunity grounds.

On August 6, 1996, Sank filed a motion pursuant to Rule 60(b), Fed. R. Civ. P., for reconsideration/reargument of the November Order dismissing the Commission Defendants and the May Opinion dismissing certain of her Title VII and Section 1983 claims. The motions were considered fully submitted on December 4, 1996.

Discussion

Rule 60(b), Fed. R. Civ. P., establishes grounds on which a court in its discretion may relieve a party from final judgment or order. It provides, in relevant part: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment." Rule 60(b), Fed. R. Civ. P. Our Court of Appeals has instructed that Rule 60(b) is "extraordinary judicial relief" and can be granted "only upon a showing of exceptional circumstances." Nemaizer v. Baker, 793 F.2d 58, 61 (2d Cir. 1986); accord United States v. Bank of New York, 14 F.3d 756, 759 (2d Cir. 1994) (Rule

[page 3]

60(b) relief available only in "extraordinary circumstances") (citing cases). Like a Rule 59(e) motion, a Rule 60(b) motion is not a substitute for an appeal. See Browder v. Director, Dep't of Corrections, 434 U.S. 257, 263 & n.7, 54 L. Ed. 2d 521, 98 S. Ct. 556 (1978).

Rule 60(b) applies only to "final judgment[s]" and not to interlocutory orders. The policy interests underlying Rule 60, securing the finality of judgments, are not implicated by the Court's interlocutory orders. See James by James v. Sadler, 909 F.2d 834 (5th Cir. 1990). The May 1995 Opinion from which Sank seeks relief dismissed only certain, not all, of Sank's discrimination claims and was therefore an interlocutory order, not a final judgment. The November 1995 Opinion, from which Sank also seeks relief under Rule 60(b), dismissed some but not all state defendants and was therefore also an interlocutory order rather than a final judgment.

Accordingly, neither Opinion constitutes a "final judgment" from which Rule 60(b) relief may be considered. See James by James, 909 F.2d at 836 (dismissal order interlocutory where some defendants remained parties to action); Wanamaker v. Columbian Rope Co., 907 F. Supp. 522, 526-27 (N.D.N.Y. 1995) (dismissal of some, but not of

plaintiff's claims was interlocutory order outside "the ambit of Rule 60(b)") (collecting cases).

[page 4]

In any event, even if the Court were to review the merits of Sank's 60(b) motions, those motions would be denied. Sank has raised no reason for the Court to grant her relief from the Court's earlier Opinion and Order, both of which were amply supported by the law and warranted under the facts of the instant case.

Conclusion

For the reasons set forth above, Sank's motions pursuant to Rule 60(b) are hereby denied. Discovery shall be completed and pretrial orders shall be submitted within 45 days of the issuance of this Opinion.

It is so ordered.

/s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

New York, N. Y.
February 11, 1997

FILED: February 13, 1997
CITATION: *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 1468 (S.D.N.Y. 2/13/1997)

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
DIANE SANK,

Plaintiff,

- against -

THE CITY UNIVERSITY OF NEW YORK, et al.,

Defendants.
----------X

NOTICE OF MOTION TO DISMISS THE AMENDED COMPLAINT

94 Civ. 0253 (RWS)

Stamped
Received
Nov 22 1994
/initialed/ JS

/HANDWRITTEN ORDER/ *Motion granted on the grounds of immunity as set forth in the authorities stated in memorandum of the Commission defendants. /signed/ J Sweet USDJ 11-10-95*

PLEASE TAKE NOTICE, that, upon the attached memorandum of law, and all papers previously submitted, the undersigned will move this Court, on behalf of defendants the New York City Commission on Human Rights, Dennis deLeon, Stephanie Orteleiva, Lizabeth Schalet and Randolph Wills (collectively, "Commission Defendants"), before the Honorable Robert W. Sweet, United State District Judge, on January 25, 1995, at the United State Courthouse, Foley Square, New York, New York, for an order pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing the amended complaint against the above-named defendants, and for such other relief as this Court deems proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to Rule 3(c)(2) of the Rules of United States District Court for the Southern District of New York, answering

[page 2]

papers, if any, must be served upon the undersigned no later than seven days prior to the return date of this motion.

Dated: New York, New York
November 22, 1994

Respectfully submitted,

PAUL A. CROTTY
Corporation Counsel of the City of New York
Attorney for the Commission Defendants
100 Church Street, Room 329B
New York, New York 10007
(212) 788-0975

By: /signed/ John P. Stern
John P. Stern (JPS-4304)
Assistant Corporation Counsel

TO: PROFESSOR DIANE SANK
173 Charlotte Place
Englewood Cliffs, N.J. 07632

MARSHA RUBIN
Assistant Attorney General
Office and P.O. Box
120 Broadway
New York, New York 10271

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
DIANE SANK,

Plaintiff,

- against -

OPINION

THE CITY UNIVERSITY OF NEW YORK, et al.,

94 Civ. 0253 (RWS)

Defendants.
----------X

APPEARANCES:

PROF. DIANE SANK
Plaintiff Pro Se
173 Charlotte Oace
Englewood Cliffs, NJ 07632

HON. DENNIS C. VACCO,
Attorney General of the State of New York,
Attorney for Moving Defendants,
120 Broadway
New York, NY, 10271
By: MARSHA RUBIN, Assistant Attorney General
Of Counsel.

[page 1]

Sweet, D. J.

Defendants Joseph S. Murphy ("Joseph Murphy"), W. Ann Reynolds ("Reynolds"), Dr. Beverly Sowande ("Sowande"), James P. Murphy ("James Murphy"), The Board of Trustees of the City University of New York (the "Board of Trustees") as constituted in the years 1988 through 1992, have moved pursuant to Rule 12(b)(1) of the Fed. R. Civ. P. to dismiss the Title VII claims against them. Defendants Bernard Harleston ("Harleston"), Anthony F. Rodriquez

("Rodriquez"), Jeffrey J. Rosen ("Rosen"), Carol Laderman ("Laderman"), June Nash ("Nash") and Fremont E. Besmer ("Besmer") move pursuant to Rule 12(b)(1) of the Fed. R. Civ. P. to dismiss the Title VII complaints against them on the basis of discrimination due to religion, age and physical disability. Sowande also moves to have all claims against her dismissed for lack of subject matter jurisdiction. For the reasons set forth below, the discrimination claims based upon religion, age, and physical disability are dismissed.

The Parties

Pro se plaintiff, Diane Sank ("Sank"), is a white, Jewish woman, over the age of 66, who walks with the aid of a cane and uses a wheeled luggage cart due to a disability resulting from an accident in 1985. Sank is a Professor of Anthropology who has been employed as such by the City College of the City of New York ("CCNY") since 1968. She was the elected Chair of CCNY's

[page 2]

Anthropology Department for a three year term beginning on July 1, 1987. She served in that capacity until June 1, 1988. Sank is a resident of New Jersey and a citizen of the United States.

Defendant Joseph Murphy was the Chancellor of the City University of New York ("CUNY") from 1987 to 1990.

Reynolds replaced Joseph Murphy as Chancellor of CUNY in September 1990.

James Murphy was the Chair of the Board of Trustees of the CUNY from 1987 throughout the time that the complaint was filed in this action.

Sowande, Associate Counsel in CUNY's General Counsel's Office, was the CUNY Freedom of Information Appeals Officer.

Harleston was the President of CCNY, at all times that he was mentioned in the complaint.

The Board of Trustees of CUNY and its members in 1988 through 1992 includes all of the individual trustees.

Rodriquez was the Assistant Vice President of Facility and Space Planning of CCNY at all times that he is mentioned in the complaint.

[page 3]

Rosen was the Dean, Division of Social Science of CCNY.

Laderman was the Chair and Professor in the Department of Anthropology (the "Department") of CCNY.

Besmer was Acting Chair in 1989-90 and 1992-93 and Associate Professor of Anthropology at CCNY.

Nash was a Professor (1971 to 1990) and Distinguished Professor (1990 to present) of Anthropology at CCNY.

Prior Proceedings

Sank filed her complaint in this Court on January 18, 1994 and an amended complaint (the "Complaint") was filed on May 27, 1994. This filing followed the events described below. The instant motions were made on October 26, 1994 and heard and marked submitted on February 15, 1995.

Facts

On April 27, 1988 a letter from Harleston to Sank notified her of his decision to discontinue her designation as Department Chairman effective June 1, 1988. Also on April

27, Harleston sent a letter to Joseph Murphy informing him of his decision.

[page 4]

On May 11, 1988 the office of the Ombudsman at CCNY wrote to Harleston expressing surprise at having action taken with respect to Sank prior to meeting with the Ombudsman. That letter announced a May 18 faculty meeting to consider the matter of the President's actions with respect to Sank and the Department.

Sank promptly (according to her on May 12) pursued administrative remedies complaining about her removal. After being informed in a letter dated May 24, 1988 that the Professional Staff Congress of CCNY could not take the complaint to grievance because "it lacked merit," Sank sent a letter CCNY Dean of Faculty and Staff Relations Silberberg, filing a Step One Grievance against Harleston, the Provost and the Dean of Social Sciences of CCNY (Rosen) for improperly removing her as chair of the Department. This Step One Grievance letter did not mention allegations of discrimination. A September 15, 1988 letter to Silberberg from Sank makes reference to her enclosure of a report on The Status of Women and Faculty Appointment in CUNY.

On July 26, 1988, apparently in response to a letter to him from Sank, Vice Chancellor Bloom, on behalf of Joseph Murphy, sent a letter to Sank advising her that if her grievance got to Phase II it would be thoroughly reviewed.

On October 13, 1988 Silberberg informed Sank by letter that her grievance has been rejected. On December 9, 1988 Sank

[page 5]

received a letter from the CCNY Acting Director of Affirmative Action advising her that "the Grievance Committee has not found a basis for your grievance of gender discrimination."

On June 8, 1989 a meeting of the Department was held to elect a chair for the remainder of the vacant term. The vote was to appoint Besmer as acting Chair. The lack of an appropriate quorum for the vote was successfully challenged through the University grievance process. Besmer was appointed properly by a vote in September. Sank alleges that the railroading of the interim appointment was part of the administration's further evidence of their discriminatory practices.

In a letter dated August 3, 1989 Ira Bloom, Vice Chancellor of CUNY, on behalf of Joseph Murphy, makes reference to Sank's July 12, 1989 letter to Joseph Murphy regarding her problems with the Department. Bloom states that is it not appropriate for the Chancellor's office to get involved at that time.

While continuing to address her complaints within the CCNY and CUNY system, Sank filed a complaint with the New York City Human Rights Commission (the "Commission") in late August 1988. On October 21, 1988 she filed a verified complaint with the Commission charging CUNY, CCNY and Harleston with sex discrimination. A copy of the verified complaint was filed with the Equal Employment

[page 6]

Opportunities Commission ("EEOC") on September 12, 1989 for dual filing purposes.

On June 27, 1989 Sank filed an amendment to her verified complaint adding charges of race discrimination.

On August 8, 1989 she again amended the complaint to allege the retaliatory seizure and dismantling of her research laboratory in late July. In this amendment she names Rodriguez as a person with whom she discussed the dismantling of her lab and states that "he refused to give me back my lab room, even though there are alternative rooms to

use for other departments." Correspondence between the Sank and the Commission and Rodriguez and Sank discuss his role in the decision to move her lab. Rodriguez was not added to the caption. (In the Court Complaint she alleges that Harleston, Rodriquez, Rosen and Besmer were all responsible for the retaliatory actions and her failure to be warned of same).

On March 3, 1990 she amended the Commission Complaint to add Besmer, the new Chair of the Department who Sank alleges threatened to take her research computer for his own use. Sank alleged in her Commission complaint that Besmer's acts were his way of thanking Harleston for appointing him as acting Chair.

[page 7]

Throughout and after the period that she was filing and amending her Commission complaint, Sank sought information through the Freedom of Information Act from CCNY and CUNY officials. The first letter request during this period was on June 9, 1988 and the last on January 2, 1992.

On July 24, 1991 the Investigator at the Commission indicated on a file memorandum regarding Sank's complaint that there was probable cause and forwarded the complaint to the Commission's Enforcement Bureau.

On January 22, 1993, the Commission issued a written determination and order finding "no probable cause to believe that respondents engaged in the unlawful discriminatory practices charged... "Sank unsuccessfully appealed the Commission's decision. She appealed the decision to the EEOC, which, according to the complaint, rejected the appeal without explanation.

On October 19, 1993 the EEOC issued a determination concurring with the conclusions of the Commission and granting her the right to sue within 90 days.

The Court Lacks Subject Matter Jurisdiction over the Claims of Age Religious Discrimination and Discrimination based on Disability

Filing a charge with the EEOC is a jurisdictional prerequisite to a private civil action under Title VII or under the

[page 8]

employment provisions of the Americans with Disabilities Act the "ADA"). 42 U.S.C. § 2000e-5(e); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798, 93 S. Ct. 1817, 1822, 36 L. Ed. 2d 668 (1973); 42 U.S.C. § 12117(a); Kent v. Director, 792 F. Supp. 59 (E.D.Mo. 1992) (ADA). Judicial relief cannot be sought for claims not listed in the original EEOC charge unless they are "reasonably related" to the charge. See Butts v. City of New York Dep't of Hous., 990 F.2d 1397, 1401 (2d Cir. 1993); Stewart v. United States Immigration & Naturalization Serv., 762 F.2d 193, 197-98 (2d Cir. 1985); Chojar v. Levitt, 773 F. Supp. 645, 650 (S.D.N.Y. 1991).

In Butts, the Court of Appeals recently described the three types of situations where claims not alleged in an EEOC charge are sufficiently related to the allegations in the charge such that it would be unfair to civil rights plaintiffs to bar such claims in a civil action. The first type of "reasonably related" claim is "essentially an allowance of loose pleading": recognizing that charges are frequently filed pro se, such claims are permitted if the employer conduct complained of would fall within the "scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Butts, 990 F.2d at 1402 (quoting Smith v. American President Lines, Ltd., 571 F.2d 102, 107 n.10 (2d Cir. 1978)). The second type is a claim alleging retaliation by an employer against an employee for filing an EEOC charge. Id. The third type is where a plaintiff alleges further

[page 9]

incidents of discrimination carried out in the same manner. Id. at 1402-03.

Nonetheless, where, as here, the alleged retaliatory termination based on race and gender form the basis of Sank's Commission complaint and EEOC charge, Sank has not alleged facts sufficient to put the EEOC on notice of her religious discrimination or discrimination based on disability claims so as to "trigger the investigatory and conciliatory procedures of the EEOC," the exercise of which underlies the requirement that plaintiffs exhaust their EEOC remedies before pursuing a judicial remedy for a Title VII or an ADA claim. See Chojar v. Levitt, 773 F. Supp. 645, 651 (S.D.N.Y. 1991) (Title VII); Miller v. Smith, 584 F. Supp. 149, 154 (D.D.C. 1984) (Title VII).

Courts in this Circuit have found a lack of subject matter jurisdiction of added claims where such additional claims could not reasonably be expected to grow out of the original charges before the EEOC. In Waterman v. New York Telephone Co., 36 Fair Empl. Prac. Cas. (BNA) 41, 1984 WL 1482 (S.D.N.Y. 1984), the plaintiff checked the box designated "sex" in her SDHR and EEOC charges, and subsequently brought a Title VII action alleging both sex and race discrimination. The court held that it lacked subject matter jurisdiction over the race discrimination claim because plaintiff had not exhausted her administrative remedies with respect to the race claim. See also Drummer, 772 F. Supp. at 826 (under "relation back"

[page 10]

standard applied to untimely amendments to a complaint, claim of religious discrimination does not "relate back" to sex discrimination charge filed before EEOC); Peterson v. Ins. Co. of North America, 1995 U.S. Dist. LEXIS 4739, 1995 WL 217492 at *2 (S.D.N.Y. 1995) ("The Courts will not permit a claim that is based on a wholly different type of discrimination to be brought if it was not initially asserted in the EEOC charge); Dennis v. Pan Am. World Airways, Inc., 746 F. Supp. 288, 291 (E.D.N.Y. 1990) (court dismissed age discrimination

claim under ADEA in Title VII action, where plaintiff asserted racial discrimination and only mentioned having to retire early in her initial EEOC charge). There is no indication in the voluminous submissions made by Sank of discrimination based on religion or disability.[1]

Sank discusses a chilling effect that she felt which made it impossible for her to raise these other claims in fear of retaliation. In her Complaint, however, except for making the conclusory allegations of discrimination on these bases she has provided no concrete examples that would allow the court to find a prima facie case of discrimination on the basis of religion or disability. With this in mind and considering the importance of the notice requirements to the scheme established by Title VII and

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[1] There is an allegation that CCNY denied Sank continued use of a parking space she required after the accident that led to her disability. The events at issue occurred in 1985 and were not alluded to in her Commission complaint. Nothing the Court can find in the Complaint ties the parking space incident to the other allegations made in the Complaint.

[page 11]

the ADA, this Court lacks subject matter jurisdiction with respect to the religious discrimination claims and the claims of discrimination based on disability and the motion for summary judgment dismissing these claims is granted.

With regard to her allegations of age discrimination, the ADEA provides that:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission ...

29 U.S.C. § 626(d).

The Court of Appeals for the Second Circuit has interpreted this provision to require plaintiffs who wishes to bring a discrimination claim under ADEA first to file charges with the EEOC, or in the case of a New York plaintiff, with the Commission. Promisel v. First Am. Artificial Flowers, 943 F.2d 251, 256 (2d Cir. 1991). It is undisputed that Sank did not file an age discrimination claim with the EEOC or the Commission. Nor for the reasons set forth above, can such claim be said to "reasonably relate" to the claims charged in those complaints. Therefore, the Court lacks subject matter jurisdiction over the age discrimination claims.

[page 12]

There is No Subject Matter Jurisdiction over the Title VII Claims Sowande, and the Board of Trustees of CUNY as Constituted in the Years 1991 and 1992

Sank has brought this action not only against defendants named and involved in the Commission investigation, but also against Joseph Murphy, Reynolds, Sowande, James Murphy, Board of Trustees as constituted in the years 1988 through 1992. They are sued for liability for each of Sank's Title VII causes of action although none of them was named as a respondent in either the Commission Complaint or the EEOC Charge.

Section 706(e) of Title VII provides that "a civil action may be brought against the respondent named in the [EEOC] charge." 42 U.S.C. § 2000e-5 (f)(1). As a general rule, a party not named in the EEOC charge cannot be named in the subsequent civil suit. Drummer v. DCI Contracting Corp., 772 F. Supp. 821 (S.D.N.Y. 1991); Giuntoli v. Garvin Guybutler Corp., 726 F. Supp. 494, 497 (S.D.N.Y. 1989); Seedman v. Alexander's, Inc., 683 F. Supp. 924, 928 (S.D.N.Y. 1987); Allen v. Colgate-Palmolive Co., 539 F. Supp. 57, 69 (S.D.N.Y. 1981); Travers v. Corning Glass Works, 76 F.R.D. 431, 433 (S.D.N.Y. 1977). This notice requirement serves the two important purposes of notifying the charged party of the

asserted violation and permitting the effectuation of Title VII'S primary goal of securing voluntary compliance with the law by bringing the charged party before the EEOC. Travers, 76 F.R.D. at 432 (quoting Bowe v. Colgate-Palmolive, 416 F.2d 711, 719 (7th Cir.1969)).

[page 13]

None of these "new" parties were named in either the Commission Complaint or the EEOC Charge. Thus, applying the general rule, Sank may not maintain this civil action against any of these "new" defendants.

Sank argues, however, that these parties are amenable to suit under an exception to the general rule. One such exception is that individuals not named in the EEOC charge may be sued in a subsequent civil action if they have been given actual notice that their conduct is being investigated and notice of intent to sue is given to the corporate employer. Seedman, 683 F. Supp. at 928; Allen, 539 F. Supp. at 69.

While it appears that among these moving defendants, at least Joseph Murphy, and perhaps the Board of Trustees in 1989 through 1990 had notice of Sank's dissatisfaction with the way that she was removed as Chair of the Department, there is no indication that Murphy or the Board of Trustees actions were part of the Commission's investigation, nor is it apparent that they should have been. The other named defendants are not mentioned in any of the Commission proceedings. As such, the Court does not have jurisdiction over the Title VII claims naming them.

A second exception is described in Johnson v. Palma, 931 F.2d 203, 209 (2d Cir. 1991); the "identity of interest" exception. This exception "permits a Title VII action to proceed against an

[page 14]

unnamed party where there is a clear identity of interest between the unnamed defendant and the party named in the administrative charge." Johnson, 931 F.2d at 209. The

Johnson court made no reference to a notice requirement that had been found in earlier cases. In Johnson the Court of Appeals adopted the following four part test to determine whether an identity of interest exists:

> 1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint; 2) whether, under the circumstances, the interests of a named party are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; 3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; 4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.

Applying these factors, Joseph Murphy, Reynolds, James Murphy and members of the Board of Trustees in 1988 through 1990 may have an identity of interests with the named defendants, particularly CUNY and CCNY.

First, it is clear that Sank could have determined the individually named defendants at the time of her complaint; she knew who they were. As to the second factor, the interests of the named defendants CUNY and CCNY are quite similar to its agents, the Chancellor, the Chair of the Board of Trustees and the trustees themselves. See Minetos v. City Univ. of New York, 875 F. Supp.

[page 15]

1046, 1051 (S.D.N.Y. 1995) (finding that the unnamed defendants CUNY and a music professor could be sued under Title VII even though only Hunter College and other professors had been named in the EEOC complaint -- "Hunter College is a senior college of the CUNY system while the

Music Professors are agents of Hunter College"); Gilmore v. Local 295, 798 F. Supp. 1030, 1037 (S.D.N.Y. 1992) (unnamed defendant, a regional field manager, had substantial identity with corporate defendant, who was named as respondent in EEOC charge, because he was the agent of the corporate defendant); Bridges v. Eastman Kodak Co., 822 F. Supp. 1020, 1025 (S.D.N.Y. 1993).

Sank suggests in her submissions that notice of her removal as Chair of the Department was put into Joseph Murphy's report to the Board with his approval and forwarded to the Trustees.

As for the third factor, neither defendants nor the facts suggest prejudice to the unnamed parties and since in the end there was no probable cause found it is hard to imagine what prejudice resulted. Finally, Sank has stated that she believed that CUNY stood for the trustees and its employees. While including all employees under the umbrella of CUNY or CCNY is far fetched, it is not unreasonable that the Chancellor or the Board of Trustees could be captured in an allegation against CUNY or CCNY. "The control of the educational work of the city university shall rest solely in

[page 16]

the board of trustees which shall govern and administer all educational units of the city university." N.Y. Educ. Law § 6204(1) (McKinney's 1985). In addition, since the same Law Department represents the individual defendants and the institutional defendants it is not unreasonable to assume that the Trustees were aware of the legal actions pending against the University and CCNY.

While proving the elements of Title VII claim remain for another day, there is sufficient possibility of identity of interest to preclude dismissing the Title VII claims against these defendants at this time.

Since the acts described in Sank's Complaint that fall under her Title VII claims do not extend past 1990, there is no basis for including members of the Board of Trustees who served only after that time. The claims against them will be dismissed. Finally, neither exception applies to Sowande. The Title VII claims against her are therefore dismissed.

The Court Will Exercise Supplemental Jurisdiction over the Freedom of Information Act Claims Against Sowande

Defendants have moved to dismiss the state law claims against Sowande because there are no federal causes of action pending against her.

[page 17]

28 U.S.C. § 1367 (a) states that:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties. (emphasis added)

The allegations by Sank against Sowande involving her failure to provide information requested under the Freedom of Information Law are integrally related to Sank's retaliation and discrimination claims against other defendants. Since the underlying jurisdiction is based on federal questions, this Court may exercise discretion in hearing related actions that meet the relatedness test described in United Mine Workers v. Gibbs, 383 U.S. 715, 725, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966), 42 U.S.C. § 1367(a); see In re Joint Eastern and Southern District Asbestos Litigation, 14 F.3d 726, 730

n.2 (2d Cir. 1993) ("the court may not exercise supplemental jurisdiction over claims unless the court has 'original jurisdiction' over at least one of the plaintiff's claims").

The claims relating to Sowande are involved in the entire picture of retaliation that Sank has painted in her Complaint. The motion to dismiss these claims on the basis that there is no supplemental jurisdiction over them is denied at this time.

[page 18]

Claims Under 28 U.S.C. § 1983 are Time Barred

Sank is entitled to bring Title VII and Section 1983 claims when the latter is based on substantive rights distinct from Title VII. Carrero v. New York City Hous. Auth., 890 F.2d 569, 575-76 (2d Cir. 1989).

The statute of limitations for bringing a federal civil rights claim pursuant to 28 U.S.C. § 1983 is three years from the last allegedly discriminatory act. Owens v. Okure, 488 U.S. 235, 102 L. Ed. 2d 594, 109 S. Ct. 573 (1988). The last act directed at Sank and attributed to any of the State defendants in the complaint was in July of 1990, more than three years before this Complaint in this action was filed in January 1994.

The claims against these defendants based on Section 1983 are time barred.

Conclusion

For the reasons discussed above, the claims for discrimination based on age, religion and disability are dismissed,

[page 19]

the Title VII claims against Sowande and Trustees for the years of 1991 and 1992 are dismissed, and relief under Section 1983 is time barred.

It is so ordered.

/s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

New York, N. Y.
May 23, 1995

FILED: May 24, 1995
CITATION: *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 7021 (S.D.N.Y. 5/24/1995)

EEOC
SEAL

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October 19, 1993

Charge No.: 16F-89-1343

Diane Sank
173 Charlotte Place
Englewood Cliffs, NJ

CUNY City College of NY
Personnel Director
535 East 80 Street
New York, NY

DETERMINATION

Under the authority vested in me by EEOC's regulations, I issue on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII and timeliness, deferral and all other jurisdictional requirements have been met. Substantial weight has been accorded to the findings of New York City Commission on Human Rights, which you have previously received.

Having examined New York City Commission on Human Rights' findings and the record presented, I conclude that the evidence obtained during the investigation does not establish violations of the statutes.

This determination concludes EEOC's processing of the subject charge. As the charge alleged a Title VII violation, this is notice that if the Charging Party wishes to pursue this matter further, (s)he may do so by filing a private action in U.S. District Court against the Respondent(s) named above within 90 days of receipt of this Determination. Once this 90 day period is over, the right to sue will be lost. Filing this notice is not sufficient. A complaint must contain a short statement of the facts of this case which shows that the aggrieved party is entitled to relief.

The lawsuit must be filed in U.S. District Court. Generally, suits are brought in the State where the alleged unlawful practice occurred, but in some cases can be brought where relevant employment records are kept, where the employment would have been, or where the respondent has its main office.

If the party cannot afford or is unable to obtain a lawyer to represent him/her, the U.S. District Court having jurisdiction in the case may, at its discretion, assist the party in obtaining a lawyer. If (s)he plans to ask the U.S. District Court to help find a lawyer, (s)he must take this request of the court in the form and manner it requires. The request to the U.S. District Court should be made well before the end of the time period mentioned above. A request for representation does not relieve the party of the obligation to file a lawsuit within this 90 day period.

Contact the EEOC if there are any questions about the legal rights, including advice on which U.S. District Court can hear the case, or if it is necessary to inspect and copy information contained in the case file.

If the suit is filed, send a copy of the court complaint to the office where the charge was filed within 10 days after filing.

The file will then be preserved. Generally, EEOC's rules call for this charge file to be destroyed two years from now unless EEOC is notified that suit has been filed in U.S. District Court.

On behalf of the Commission:

/S. H. L. Jr./

Spencer H. Lewis, Jr.
District Director

Charging Party Copy

EEOC
SEAL

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October 19, 1993

Charge No.: 16F-89-1009

Diane Sank
173 Charlotte Place
Englewood Cliffs, NJ

CUNY City College of NY
Personnel Director
535 East 80 Street
New York, NY

DETERMINATION

Under the authority vested in me by EEOC's regulations, I issue on behalf of the Commission, the following determination as to the merits of the subject charge.

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On behalf of the Commission:

/S. H. L. Jr./

Spencer H. Lewis, Jr.
District Director

Charging Party Copy

DETERMINATION AND ORDER
AFTER INVESTIGATION

CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS
----------X
In the Matter of the Complaint of

DIANE SANK,
Complainant

-against-

Complaint and Amended Complaint No. EM00457-08/24/88-DE, EEOC No. 16F-89-1099

CITY UNIVERSITY OF NEW YORK,
CITY COLLEGE OF NEW YORK,
BERNARD HARLESTON, PRESIDENT
FREMONT BESMER, CHAIR,
ANTHROPOLOGY,
Respondents.
----------X

On October 21, 1988, Professor Diane Sank (Complainant" or "Professor Sank" or "Sank") filed a verified complaint with the New York Commission on Human Rights ("Commission") charging City University of New York ("CUNY") and City College of New York ("CCNY" or "college"), Bernard Harleston, President (the "President") and Fremont Besmer, Chair Anthropology Department, ("Besmer" or "Professor Besmer") with discrimination in violation of the Administrative Code of the City of New York (the "code"). Professor Sank amended her complaint on June 27, 1989, August 8, 1989, and March 3, 1990.

Respondents deny all of Complainant's allegations.

After investigation, the Law Enforcement Bureau ("Bureau") of the Commission has determined that there is no probable cause to believe that respondents engaged in the unlawful discriminatory practices charged in the complaint and amended complaints.

[page 2]

REMOVAL OF SANK AS CHAIRPERSON

Professor Sank charged in her original complaint that she was illegally removed by the President from her position as Chairperson of the Anthropology department because of the President's discriminatory animus. In her first amendment to the complaint, Professor Sank charged that she was removed from her position because of her race and color (white) in addition to her sex (female).

Respondents claim that Complainant was removed because of a negative Outside Review Committee report and not because of discrimination. The investigation concluded that Professor Sank was removed from her position because of non-discriminatory reasons.

The investigation consisted of a review of documentation interviews with other witnesses as well as a fact-finding conference.

Complainant worked as a faculty member of the Anthropology Department at CCNY. In or about May of 1987, she was elected to the position of Chairperson of the Anthropology Department by her colleagues in the department for the term of July 1, 1987 to May of 1990.

CCNY has used Outside Review Committees ("ORC") to evaluate each department as part of a college-wide evaluation process since 1981. These committees are comprised of professors from other universities. The ORC issues an Outside Review Committee Report ("OCR Report") at the conclusion of its investigation.

[page 3]

The investigation of Professor Sank's claims required reading and reviewing all fifteen of the ORC reports done at CCNY. The investigation determined from reviewing all of the ORCs that no other ORC report had ever specifically recommended that a Chairperson be removed; and almost no other report was as negative in its evaluation of a department as the ORC report was of the CCNY Anthropology department.

The CCNY Anthropology department was evaluated by the ORC on or about December 3 and 4, 1987 and the report was issued in January of 1988. While the ORC was quite [sic] critical of the Anthropology Department, it also praised the department and all of its faculty members a great deal. Moreover, it clearly and strongly recommended the immediate removal of Complainant as Chairperson of the Anthropology department and that she be replaced with an interim chairperson from outside the department. This report stated:

> Unable to govern itself it (the department) turned to Professor Sank to rescue it by electing her chair. Unfortunately, immediately after her election, she too, being a member of the family, became victim of its collective neurosis....the department which elected her withdrew it collective support. Without that support it has been impossible for her to accomplish anything and she has been reduced to a symbol of the department's own collective malaise.... The department is in a state of crisis and breakdown which it is unable to solve by and for itself. We propose an immediate but interim, solution of semi-receivership for the department....
>
> The most urgent need of the department is for a new outside Chairperson...We recommend in the strongest terms possible, and as absolutely essential to the future of the department, that the College allocate a line
>
> [page 4]
>
> for such a new Chairperson. Pp. 10-12 of the ORC report of the CCNY Anthropology department.

Complainant alleges and Respondents admit that on or about April 27, 1988, she received a letter from President Harleston which informed her of his decision to remove her as the elected chairperson of the department effective June 1,

1988. Professor Sank charged that similarly situated male department chairpersons were not removed from their positions even though they received negative evaluations from the Outside Review Committees and she was differentially treated because of her sex.

The investigation did uncover the fact that in 1982, the President sought to remove Professor John Dean as chairperson of the Architecture department after a negative ORC report. Professor Dean resigned and thus negated the removal by the President. Professor Sank claims that Professor Dean was given the opportunity to resign before being involuntarily removed and that Complainant was not given this same chance because of her sex. Respondents counter that Sank made it clear she would not resign and therefore she was not offered the opportunity.

Professor Sank sent a letter to the President which stated that she disagree with the ORC recommendation concerning her removal as Chairperson. She write [sic] to the President: "I expect to serve my full three year term without interruption." This letter is evidence that Complainant communicated her unwillingness to resign." Further, it substanciates Respondents's [sic] explanation that Professor Sank was not offered the opportunity to resign because it

[page 5]

was felt that she would not avail herself of the opportunity had it been presented to her.

Complainant also alleges that the President selectively acted on the report's recommendations. Specifically, the ORC report also recommended removal of the Anthropology department secretary; however, the President failed to act on this recommendation. The investigation included a review of the written responses to the ORC report and these responses offer a reason for the President's decision to remove Complainant pursuant to the report and not the department secretary.

Complainant submitted a written response individually, another professor submitted one individually and the other four (of the six) faculty members in the Anthropology

department submitted a joint written response to the ORC report. The four professors stated in their report that they agreed with the recommendation to remove Professor Sank as chairperson but that they disagreed with the recommendation to remove the secretary.

The investigation revealed that the President's decisions to remove both Professor Sank and the secretary were discretionary. At the fact-finding conference, Respondents claimed that it is not the President's role to remove secretaries from their positions, that decisions concerning secretarial staff are handled by the college's personnel department. The investigation uncovered no written policy that indicated whom the President should and should not remove. Additionally, the faculty support for removing Professor Sank and not the secretary supports the President's

[page 6]

decision in this regard. Finally, the Secretary was a white woman, and if the President was truly biased against white women he may have taken the opportunity to remove the secretary, another white woman. Thus, the fact that the President removed Professor Sank and not the secretary does not lend support to Complainant's allegations.

The Complainant contends that the President's refusal to meet with her to discuss her removal as Chairperson was discriminatory. Complainant contends that the President refused such a meeting despite repeated requests. The investigation concluded that the President's decision not to meet with Complainant was based on nondiscriminatory factors. The investigation included a review of the CUNY Bylaws and specifically the relevant Bylaws, 11.4(b) and 9.1(c) regarding removal of personnel by the President. These Bylaws allow the President to "remove a department chairperson in accordance with section 9.1(c)." Pursuant to 9.1(c), in order to exercise this authority the President must meet with the department and confer with the Board of Trustees prior to the removal. The investigation revealed that the President did meet with the entire Anthropology department on Feb. 28, 1988 and that he also met with the

Board of Trustees. He was not required to meet with Sank individually and thus, he followed the Bylaws with regards to Professor Sank.

Additionally, at the fact-finding conference, the President stated that he did not meet with Complainant because she had already filed a grievance against him concerning the removal issue.

[page 7]

Therefore, it was inappropriate for him to meet with her and he was advised not to do so by CCNY's legal counsel. A review of the documentary evidence concerning the grievance substantiates that Professor Sank had already filed a grievance. Finally, there is no data with which to compare Professor Sank to determine whether she was disparately treated because of her sex, race and color when the President chose not to meet with her individually.

Complainant also charges that the President's use of the word chairman rather than chairperson, and the omission of her own name, in the letter he sent to her communicating his decision to remove her as chair, were discriminatory. There is no comparable data with which to compare Complainant to in this regard, so it is impossible to engage in a disparate treatment analysis. However, the investigation did reveal that there is no written CUNY or CCNY rule concerning the usage of these words. It certainly may have been more respectful and considerate of the President to have met personally with Professor Sank, to use the word chairperson rather than chairman, and to use her own name when addressing her. However there are no such requirements and these discourteous slights cannot be considered acts of discrimination .

Complainant, in her June 27, 1989 amendment to the complaint, charged that she was removed because of her race and color in addition to her sex. As proof she charges in the complaint that "the President has a publicly stated policy of bias in favor of Black males." Complainant provided a copy of a graduation speech given by the President to support the allegation. The speech in

[page 8]

part stated that the full education of Black males must be a priority in our society. A review of the speech leads to the conclusion that the President hopes for an equal place for minorities in society but does not state a bias in favor of Black males. No other indication of a publicly stated bias in favor of Black males on the part of the President was discovered during the investigation.

Complainant also charged in this amendment that "... most permanent appointments by the President during his tenure have been Black males." Professor Sank specifically informed the investigator that she meant administrative appointments in this amendment. A review of all of the permanent appointments by the President is not warranted and is not relevant in determining whether or not Complainant was removed pursuant to a report that was critical of the department she chaired. However, it must be noted that the President appointed a white woman (Professor Carol Laderma) as permanent chairperson of the Anthropology department after offering the position to two other white women who refused it. .

Complainant also charges that the President's decision to appoint a Black male, Professor Delmos Jones, as interim chair was an example of discriminatory treatment directed at her or could be used to substantiate her claim regarding the President's bias in favor of Black males. However, the ORC report specifically named three individuals who could successfully serve as interim Chairperson; Delmos Jones was one of them. In the written response

[page 9]

to the ORC, four of the six faculty stated that they felt Professor Jones would be the best person to act as interim Chairperson as he was from the CUNY Graduate Center and could successfully build bridges between the CCNY undergraduate Anthropology department and the CUNY Graduate Center. Complainant points to the fact that the other two individuals specifically named in the ORC report were women and that one was also from the CUNY Graduate

Center to buttress her argument. She claims that these two women were not interviewed for the position.

The decision to appoint Professor Delmos Jones and not one of the two women who were recommended in the ORC report was not an act of discrimination aimed at Complainant. Moreover, the concrete, non-discriminatory reasons for appointing Professor Jones (faculty support and Graduate school affiliation) outweigh Complainant's allegation that Professor Jones' appointment as interim chairperson is evidence of discrimination by the President.

Finally, Complainant points to the election of Professor Besmer, (a faculty member of the Anthropology department during all of the relevant time period) as interim Chairperson, after Professor Jones, as another example of discriminatory treatment and as further evidence of the President's discriminatory bias. Complainant charges in her third amendment to the complaint that "...the President appointed Besmer as Chairperson in direct opposition to the (ORC) committee's recommendations. Therefore, I believe that the College's reasons for my forced removal as Chairperson is pretextual for discrimination, based upon my

[page 10]

membership in a protected class." The Complainant also added Professor Besmer as a respondent with this third amendment.

The investigation of this issue included a review of the letter that Complainant wrote to the President regarding this issue, a review of the grievance that Complainant filed about the issue and another review of the original ORC report. The investigation revealed that Professor Jones decided not to continue as acting chair of the Anthropology department in May of 1989. The department subsequently held an election for the position at which they unanimously elected Professor Besmer acting chair. Complainant filed a grievance because the election occurred during the summer recess and she contended that this was a violation of the union contract. The grievance was decided in her favor by the College and the Anthropology department held another election after the

summer. With the sole exception of Professor Sank's vote, Professor Besmer was again elected to serve as acting chair while the search continued. Consequently, the investigation determined that Besmer was elected and the President did not appoint Besmer as chairperson of the Anthropology department as alleged by Complainant.

Complainant claims that the President should have removed Besmer after the election. However, Besmer was not the subject of the ORC report that discussed Complainant and it was now one year later. Moreover, he was twice elected to serve as acting chairperson and thus had the support of the department.

[page 11]

In the amendment, Complainant is essentially renewing her earlier allegation that she was removed because of her membership in a protected class and not because an ORC report strongly recommended her removal for the good of the students. The investigation determined that Complainant was indeed removed pursuant to the report's recommendations and-not because-of illegal discrimination by the President. The report was based on site visits and interviews done in early December of 1987, and strongly urged that Complainant be removed immediately,

Consequently, no evidence was uncovered to support Complainant's allegation that she was removed as chairperson of the Anthropology department at CCNY because of her sex, race and color.

RETALIATION

The HRL prohibits retaliation for opposition to perceived unlawful discrimination. A prima facie case of retaliation is established once the complaint shows: (1) she engaged in statutorily protected expression; (2) she suffered adverse employment action; and (3) the existence of a casual link between the protected activity and the adverse employment action.

Complainant, in an amendment to the complaint, alleges that in or about May 1989, her request for a one semester

leave with pay was denied in retaliation for filing grievances with the College and complaints with the Commission against the President.

The investigation revealed that the President was not involved with the decision to deny Complainant a one semester leave with pay. The union contract between CCNY and the CCNY faculty governs

[page 12]

the process and the decision. Consequently, this retaliation claim must fai1 because there was no causal link between the protected activity and the adverse employment decision.

The investigation included interviews with those who were involved with the decision concerning leave, and it appears that Complainant was not given the leave because there were other requests that were deemed more worthy. However, Paragraph 25.5 of the contract states that "Special consideration shall be given to those applicants who have not had a sabbatical or fellowship within fourteen years." The investigation revealed that Complainant deserved such "special consideration" because she had not taken a leave in 21 years. The interviews conducted revealed that indeed Complainant was not given this "special consideration." This may have been a violation of her union contract. However, there is no evidence to substantiate Complainant's claim that the denial was retaliatory in nature, as the President was in no way involved with the decision.

Complainant also alleges that her research lab was moved to another smaller room in retaliation for filing a complaint at the Commission and a grievance at the College. She alleged also that the college failed to properly notify her about this move and that the process of relocating the laboratory was unfair and inappropriate considering her seniority on the CCNY faculty

Respondents deny that retaliatory animus was the motivating factor in their decision to relocate Complainant's lab. Further, Respondents state that Complainant' s lab was taken to provide the

[page 13]

computer science department with two contiguous spaces and secondly, that Complainant was underutilizing her space and that the equipment therein was boxed. Complainant countered that (a) the chairperson of the computer science department never specified that two contiguous rooms were needed and that (b) hers was an active lab and continual theft required her to keep her work in boxes.

A review of the documentary evidence submitted and Respondents as well as interviews and a review of relevant affidavits concerning the lab show that Complainant's claim of retaliation with regard to her lab must also fail because again there is no causal link between the protected activity and the adverse employment action. Specifically, the President was unaware of and not involved with the decision to change the room assignment of Complainant's laboratory and thus there -is no link between Complainant's protected activity (filing a complaint at the Commission against CCNY and CUNY) and the adverse employment action (change in Complainant's laboratory space by space advisory committee).

Complainant discovered that the lab had been moved without her knowledge or supervision on July 28, 1989. The investigation determined that there was a letter dated July 21, 1989 and postmarked July 27, 1989 which informed Complainant of the impending move of her lab. Perhaps a senior, tenured professor like Professor Sank should have been shown more consideration with regards to notice, however, the failure to send the letter earlier

[page 14]

or to call Professor Sank cannot be deemed discriminatory. The investigation revealed that there was a major space reallocation project on the CCNY campus during the fall semester of 1988 and throughout 1989. There were major renovations and construction on the campus around the time and the College instituted a plan to accommodate a severe space shortage that resulted. A space advisory committee was active at the college; Assistant Vice President Rodriguez ("AVP Rodriguez") was in charge of the

replacement of lost classrooms due to construction and the space advisory committee.

Complainant claims that her laboratory was not on the original list of rooms needed for the space reallocation and that the chairperson of the computer science department did not specify a need for two contiguous rooms. However, the investigation revealed that AVP Rodriguez was the individual who made the decision that computer science needed two contiguous rooms and not the computer science department. The investigation uncovered no evidence that AVP Rodriguez knew about Sank's complaint to the Commission or about her grievances at the College. Therefore, it is wholly irrelevant whether computer science needed two contiguous rooms or whether AVP made this decision.

The investigation could not determine the veracity of Respondents assertion that Complainant underutilized her laboratory space, however, such a conclusion is unnecessary because of the lack of a causal link between the protected activity and the alleged adverse employment action' Complainant points to a

[page 15]

resolution from the Academic Freedom and Faculty Interests Committee ("AFFI resolution") to support her position. The AFFI resolution condemned the college for not consulting with Sank and for making hasty judgments about the underutilization of space by faculty. However, the AFFI resolution specifically found that the lab was not moved because Professor Sank filed a grievance. Thus, both the AFFI investigation and the Commission investigation determined that the changing of Complainant's lab-room was not done in retaliation for engaging in protected activity.

In Complainant's next amendment to the complaint, she alleged that in or about September 1989, she was asked to return her research computer to the department by Professor Besmer and that this was also retaliatory treatment. Respondents asserted that the computer at issue is college property and not the personal property of Sank. They further contend that the computer was purchased with tax-levy money

given to the college and designated for masters degree students in the department, that Sank borrowed it during an intersession break in 1986 and has since refused to return it to the department. Finally, Respondents assert that the computer was needed by the masters degree students in the department,

The investigation revealed that the Executive Committee of the Anthropology department requested that Complainant return the computer on two different occasions so that it could be used by the masters degree students; Complainant twice refused. The Complainant asserts that the department received a new computer in January 1990 and the interim chairperson, Professor Besmer failed to request an

[page 16]

additional computer even though he had the authority to do so. Complainant thus reasoned that Besmer's request for the return of the department computer was discriminatory.

Complainant's allegation concerning the computer must fail for two reasons. First, the investigation revealed that Complainant has indeed refused to return the computer and still has it in her possession. Therefore, the investigation established that there was no adverse employment action. Secondly, the investigation again failed to uncover evidence supporting a causal link between the alleged adverse employment action and the protected activity. A majority of the department voted twice in favor of Complainant returning the computer to the department's masters degree students. There is absolutely no evidence which suggests the request for the return of the departmental computer was motivated by a discriminatory animus or was due to retaliation.

Upon the foregoing, the complaint is ordered dismissed.

The Complainant may apply for a review of this order by filing a request in writing for such review within thirty (30) days after the date of the mailing of this order. The application should be addressed to the Chairperson, New York City Commission on Human Rights, 40 Rector Street, New York. New York 10006. Please state reasons for applying for the review.

A copy of this Order and Determination has today been sent via certified mail to the parties listed below.

[page 17]

New York City Commission on
Human Rights
By:_____/S/_____
Randolph Wills, Esq.
Managing Attorney

Law Enforcement Bureau
New York City Commission
On Human Rights
New York, New York 10004

Dated January 24, 1993
New York, New York

Notice to:
Professor Sank
173 Charlotte Place
Englewood Cliffs, NJ 07632

Terry Roemer, Esq.
Office of the General Counsel
And Vice Chancellor for Legal Affairs
City University of New York
535 East 80th Street
New York, NY 10021

U.S. Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

U.S. Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 USC § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District

Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

28 U.S.C. § 1331. - Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603 (a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to

which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include

claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

42 U.S.C. § 1983. - Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia

42 U.S.C. § 2000e. Definitions

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include

(1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject

by statute to procedures of the competitive service (as defined in section 2102 of title 5), or

(2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501 (c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e–16 of this title.

42 U.S.C. § 2000e–2. Unlawful employment practices

(a) **Employer practices**

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national

origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e–3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e–4. Equal Employment Opportunity Commission

(a) Creation; composition; political representation; appointment; term; vacancies; Chairman and Vice Chairman; duties of Chairman; appointment of personnel; compensation of personnel

There is hereby created a Commission to be known as the Equal Employment Opportunity Commission . . . .

42 U.S.C. § 2000e–5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful

employment practice as set forth in section 2000e–2 or 2000e–3 of this title.

Fed. R. Civ. P., Rule 8. General Rules of Pleading

(a) Claims for Relief.

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(d) Effect of Failure To Deny.

Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be Concise and Direct; Consistency

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(f) Construction of Pleadings

All pleadings shall be so construed as to do substantial justice.

Fed. R. Civ. P., Rule 10(c). Form of Pleadings

(c) Adoption by Reference; Exhibits.

Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in

any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

Fed. R. Civ. P., Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures.

Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part

or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(E) The following categories of proceedings are exempt from initial disclosure under Rule 26(a)(1):

(i) an action for review on an administrative record;

(ii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;

(iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision;

(iv) an action to enforce or quash an administrative summons or subpoena;

(v) an action by the United States to recover benefit payments;

(vi) an action by the United States to collect on a student loan guaranteed by the United States;

(vii) a proceeding ancillary to proceedings in other courts; and

(viii) an action to enforce an arbitration award.

These disclosures must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan. In ruling on the objection, the court must determine what disclosures - if any - are to be made, and set the time for disclosure. Any party first served or otnerwise joined after the Rule 26(f) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures

based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to

contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(3) Pretrial Disclosures.

In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to other parties and promptly file with the court the following information regarding the evidence that it may present at trial other than solely for impeachment:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and promptly file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under Rule 26(a)(3)(C).

Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, are waived unless excused by the court for good cause.

(4) Form of Disclosures; Filing.

Unless the court orders otherwise, all disclosures under Rules 26(a)(1) through (3) must be made in writing, signed, and served.

(5) Methods to Discover Additional Matter.

Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits.

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General.

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

(2) Limitations.

By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

(3) Trial Preparation: Materials.

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect

to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials.

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Supreme Court, U.S.
FILED

No. 04 672 NOV 15 2004

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 2004

DIANE SANK,

Petitioner,

v.

THE CITY UNIVERSITY OF NEW YORK, ET AL,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

APPENDIX C, pp. 201a-247a
TO PETITION FOR WRIT OF CERTIORARI

Diane Sank
Petitioner *Pro Se*
173 Charlotte Place
Englewood Cliffs, NJ 07632
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Fed. R. Civ. P., Rule 37. Failure to Make or Cooperate in Discovery; Sanctions

(a) Motion for Order Compelling Disclosure or Discovery.

A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(1) Appropriate Court.

An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken.

(2) Motion.

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or

material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) Evasive or Incomplete Disclosure, Answer, or Response.

For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(4) Expenses and Sanctions.

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(1) Sanctions by Court in District Where Deposition is Taken.

If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action Is Pending.

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or

dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the

reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).

(e) [Abrogated]

(f) [Repealed]

(g) Failure to Participate in the Framing of a Discovery Plan.

If a party or a party's attorney fails to participate in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

Fed. R. Civ. P., Rule 56. Summary Judgment

(a) For Claimant.

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion.

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable.

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Fed. Evid. Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c)

not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. Evid. Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. Evid. Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Federal Rules of Appellate Procedure, Rule 47. Rules of a Court of Appeals

(a) Local Rules.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

Local Civil Rule 56.1. Statements of Material Facts on Motion for Summary Judgment

(a) Upon any motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit such a statement may constitute grounds for denial of the motion.

(b) The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

(c) All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

(d) Each statement of material fact by a movant or opponent must be followed by citation to evidence which would be admissible, set forth as required by Federal Rule of Civil Procedure 56(e).

[Source: Former Local Civil Rule 3(g)]

Local Civil Rule 56.2. Notice to Pro Se Litigants Opposing Summary

Any represented party moving for summary judgment against a party proceeding *pro se* shall serve and file as a separate document, together with the papers in support of the motion, a "Notice To Pro Se Litigant Opposing Motion For Summary Judgment" in the form indicated below. Where the

pro se party is not the plaintiff, the movant shall amend the form notice as necessary to reflect that fact.

Notice To Pro Se Litigant Opposing Motion
For Summary Judgment

The defendant in this case has moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. This means that the defendant has asked the court to decide this case without a trial, based on written materials, including affidavits, submitted in support of the motion. THE CLAIMS YOU ASSERT IN YOUR COMPLAINT MAY BE DISMISSED WITHOUT A TRIAL IF YOU DO NOT RESPOND TO THIS MOTION by filing your own sworn affidavits or other papers as required by Rule 56(e). An affidavit is a sworn statement of fact based on personal knowledge that would be admissible in evidence at trial. The full text of Rule 56 is attached.

In short, Rule 56 provides that you may NOT oppose summary judgment simply by relying upon the allegations in your complaint. Rather, you must submit evidence, such as witness statements or documents, countering the facts asserted by the defendant and raising issues of fact for trial. Any witness statements, which may include your own statements, must be in the form of affidavits. You may submit affidavits that were prepared specifically in response to defendant's motion for summary judgment.

Any issue of fact that you wish to raise in opposition to the motion for summary judgment must be supported by affidavits or by other documentary evidence contradicting the facts asserted by the defendant. If you do not respond to the motion for summary judgment on time with affidavits or documentary evidence contradicting the facts asserted by the defendant, the court may accept defendant's factual assertions as true. Judgment may then be entered in defendant's favor without a trial.

If you have any questions, you may direct them to the Pro Se Office.

N.Y. Educ. Law § 6201. Legislative findings and intent

1. The legislature finds that in order to meet the state's responsibility to provide post-secondary education in New York city beyond the associate degree level, as it does elsewhere in the state, there should be full state funding of senior college operating and debt service. The governance of the university must reflect increased state responsibility but should preserve the city's participation in the governance of the university it created and developed at city expense.

2. The legislature intends that the city university of New York should be maintained as an independent system of higher education governed by its own board of trustees responsible for the governance, maintenance and development of both senior and community college units of the city university.

3. The legislature's intent is that the city university be supported as an independent and integrated system of higher education on the assumption that the university will continue to maintain and expand its commitment to academic excellence and to the provision of equal access and opportunity for students, faculty and staff from all ethnic and racial groups and from both sexes.

N.Y. Educ. Law § 6204(1)

The control of the educational work of the city university shall rest solely in the board of trustees which shall govern and administer all educational units of the city university.

N.Y. Educ. Law § 6205 Liability of board of trustees and liability of city university of New York

1. The state shall save harmless and indemnify members of the board of trustees and any duly appointed member of the teaching or supervising staff, officer or employee, and a student serving on a university or college body or committee

which is composed of a majority of faculty, administration and trustees, of the senior colleges under the jurisdiction of such board pursuant to section seventeen of the public officers law against any claim, demand, suit or judgment arising by reason of any act or omission to act by such person occurring in the discharge of his duties and within the scope of his service on behalf of such university.

(e) The city of New York shall indemnify and save harmless employees of the community colleges of the city university in the amount of any judgment obtained against such employees in any state or federal court, or in the amount of any settlement of a claim, provided that the act or omission from which such judgment or settlement arose, occurred while the employee was acting within the scope of his public employment or duties; the duty to indemnify and save harmless prescribed by this subdivision shall not arise where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee.

Title 47 Administrative Code of the City of New York, Rules of Practice (Commission on Human Rights)

§1-02 Organization of Commission.

In order to carry out its various statutory responsibilities in a fair and impartial fashion, the Commission has separated its functions into discrete bureaus and offices, each of which reports to the Chair of the agency. In addition to the Chair and the Commissioners, the following components of the Commission are directly involved in the enforcement of the HRL:

(a) Law Enforcement Bureau. The Law Enforcement Bureau is charged with the Commission's investigatory and prosecutorial functions. Where an action is authorized or required to be taken by the Law Enforcement Bureau, such action shall be taken by the Deputy Commissioner for Law Enforcement, such Law Enforcement Bureau staff as the

Deputy Commissioner shall designate, or such person as may be appointed by the Chair of the Commission.

(b) Office of General Counsel. The Office of General Counsel serves as counsel to the Chair and to the Commissioners. Where an action is authorized or required to be taken by the Office of General Counsel, such action shall be taken by the General Counsel, such staff of the Office of General Counsel as the General Counsel shall designate, or such person as may be appointed by the Chair of the Commission.

(c) Office of Mediation and Conflict Resolution. The Office of Mediation and Conflict Resolution provides mediation and conciliation services in connection with complaints that have been filed. Where an action is authorized or required to be taken by the Office of Mediation and Conflict Resolution, such action shall be taken by the Deputy Commissioner for Mediation and Conflict Resolution, such staff of the Office of Mediation and Conflict Resolution as the Deputy Commissioner shall designate, or such person as may be appointed by the Chair of the Commission.

§1-34 Availability of Investigatory Materials.

Upon an order of the Law Enforcement Bureau dismissing the complaint, complainant and respondent may examine the factual documentation in the investigatory file.

Subchapter E Determination Of Whether Probable Cause Exists

§1-51 Basis of Determination.

The Law Enforcement Bureau shall find probable cause exists to credit the allegations of a complaint that an unlawful discriminatory practice has been or is being committed by a respondent where a reasonable person, looking at the evidence as a whole, could reach the conclusion that it is more likely than not that the unlawful discriminatory practice was committed.

§ 1-52 Notice of Determination.

The Law Enforcement Bureau shall serve a written notice of determination upon complainant and respondent. Determinations which state that probable cause has been found not to exist and that dismiss the complaint shall state the reasons for the Law Enforcement Bureau's conclusion.

§1-53 Review of Determination.

A determination that probable cause exists to credit some or all of the allegations of a complaint that an unlawful discriminatory practice has been or is being committed is not reviewable. A determination that probable cause does not exist to credit some or all of the allegations of a complaint that an unlawful discriminatory practice has been or is being committed, and that the complaint is accordingly dismissed in whole or in part, is reviewable in accordance with subdivision (f) of~1-22 of this Chapter.

Subchapter F Mediation And Conciliation

§1-61 Conciliation Agreements.

The Law Enforcement Bureau, complainant, respondent, and other necessary parties may at any time after the filing of a complaint agree to a conciliated resolution of a complaint.

Administrative Code of the City of New York
Title 8, Chapter 1. Commission on Human Rights

§ 8-103 Commission on human rights.

There is hereby created a commission on human rights. It shall consist of fifteen members, to be appointed by the mayor, one of whom shall be designated by the mayor as its chairperson and shall serve as such at the pleasure of the mayor. The chairperson shall devote his or her entire time to the chairperson's duties and shall not engage in any other occupation, profession or employment. Members other than

the chairperson shall serve without compensation. Of the fifteen members first appointed, five shall be appointed for one year, five for two years and five for three years; thereafter all appointments to the commission shall be for a term of three years. In the event of the death or resignation of any member, his or her successor shall be appointed to serve for the term for which such members had been appointed.

§ 8-105 Powers and duties.

The powers and duties of the commission shall be:

(1) To work together with federal, state and city agencies in developing courses of instruction, for presentation to city employees and in public and private schools, public libraries, museums and other suitable places, on techniques for achieving harmonious intergroup relations within the city of New York, and engage in other anti-discrimination activities.

(2) To enlist the cooperation of various groups, and organizations, [sic]1 in mediation efforts, programs and campaigns devoted to eliminating group prejudice, intolerance, hate crimes bigotry and discrimination.

(3) To study the problems of prejudice, intolerance, bigotry, discrimination and disorder occasioned thereby in all or any fields of human relationship.

(4) (a) To receive, investigate and pass upon complaints and to initiate its own investigations of:

(i) Group tensions, prejudice, intolerance, bigotry and disorder occasioned thereby.

(ii) Discrimination against any person or group of persons, provided, however, that with respect to discrimination alleged to be committed by city officials or city agencies, such investigation shall be commenced after consultation with the mayor. Upon its own motion, to make, sign and file complaints alleging violations of this chapter.

(b) In the event that any investigation undertaken pursuant to paragraph a of this subdivision discloses information that any person or group of persons may be engaged in a pattern or practice that results in the denial to any person or group of persons of the full enjoyment of any right secured by this chapter, in addition to making, signing and filing a complaint upon its own motion pursuant to paragraph a of this subdivision, to refer such information to the corporation counsel for the purpose of commencing a civil action pursuant to chapter four of this title.

§ 8-117 Rules of Procedure. The commission shall adopt rules providing for hearing and pre-hearing procedure. These rules shall include rules providing that the commission, by its prosecutorial bureau, shall be a party to all complaints and that a complainant shall be a party if the complainant has intervened in the manner set forth in the rules of the commission. These rules shall also include rules governing discovery, motion practice and the issuance of subpoenas. Wherever necessary, the commission shall issue orders compelling discovery. In accordance with the commission's discovery rules, any party from whom discovery is sought may assert an objection to such discovery based upon a claim of privilege or other defense and the commission shall rule upon such objection.

§ 8-119 Hearing.

g. The commission shall not be bound by the strict rules of evidence prevailing in courts of the state of New York. The testimony taken at the hearing shall be under oath and shall be transcribed.

§ 8-126 Civil penalties imposed by commission for unlawful discriminatory practices.

a. Except as otherwise provided in subdivision thirteen of section 8-107 of this chapter, in addition to any of the remedies and penalties set forth in subdivision a of section 8-

120 of this chapter, where the commission finds that a person has engaged in an unlawful discriminatory practice, the commission may, to vindicate the public interest, impose a civil penalty of not more than fifty thousand dollars. Where the commission finds that an unlawful discriminatory practice was the result of the respondent's willful, wanton or malicious act, the commission may, to vindicate the public interest, impose a civil penalty of not more than one hundred thousand dollars.

§ 8-105 Powers and duties. The powers and duties of the commission shall be:

(1) To work together with federal, state and city agencies in developing courses of instruction, for presentation to city employees and in public and private schools, public libraries, museums and other suitable places, on techniques for achieving harmonious intergroup relations within the city of New York, and engage in other anti-discrimination activities.

Omitted

(4) (a) To receive, investigate and pass upon complaints and to initiate its own investigations of:

> (i) Group tensions, prejudice, intolerance, bigotry and disorder occasioned thereby.

(ii) Discrimination against any person or group of persons, provided, however, that with respect to discrimination alleged to be committed by city officials or city agencies, such investigation shall be commenced after consultation with the mayor. Upon its own motion, to make, sign and file complaints alleging violations of this chapter.

ABA Model Canons of Professional Conduct

Canon 5. A Lawyer should exercise independent professional judgment on behalf of a client.

Ethical Considerations

EC 5-1. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

EC 5-16. In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate the need for representation free of any potential conflict and to obtain other counsel if the client so desires. Thus before a lawyer may represent multiple clients, the lawyer should explain fully to each client the implications of the common representation and otherwise provide to each client information reasonably sufficient, giving due regard to the sophistication of the client, to permit the client to appreciate the significance of the potential conflict, and should accept or continue employment only if each client consents, preferably in writing. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, the lawyer should also advise all of the clients of those circumstances.

EC 5-21. The obligation of a lawyer to exercise professional judgment solely on behalf of the client requires disregarding the desires of others that might impair the lawyer's free judgment.

EC 5-23. A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals

without regard to the professional responsibility of the lawyer to an individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to their detriment. Similarly, an employer may see, consciously or unconsciously, to further its own economic interests through the actions of the lawyers employed by it. Since a lawyer must always be free to exercise professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of professional freedom.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

FORMAL OPINION 1987-3

COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

April 30, 1987

ACTION: Formal Opinion

OPINION:

Lawyer X, a staff attorney at a government agency which receives, investigates and prosecutes complaints of employment discrimination, has learned from a complainant, after a probable cause finding of discrimination was issued by the agency, information that would, if an attorney-client relationship existed, be protected as a confidence or secret and that is likely to be materially adverse to the complainant's case.

Lawyer X asks (i) whether he has the ethical obligation, when acting as counsel for both the complainant and the agency (a dual relationship created by statute), to disclose the materially

adverse information to the attorney for the employer and (ii) whether he has the ethical obligation, when acting as counsel for only the agency, to disclose the information to the employer. We answer the first inquiry in the negative and the second inquiry in the affirmative, subject to the conditions discussed below.

I. The First Inquiry

When by statute Lawyer X is counsel for both the complainant and the agency, the Committee is of the opinion that he does not have the ethical obligation to disclose the materially adverse information to the employer's attorney, provided that, in so doing, Lawyer X is not required to make any misleading or false representations to the Tribunal. The complainant confided to Lawyer X in the course of the attorney-client relationship and, as a result, the information should be maintained, in most cases, in confidence by Lawyer X.

A. The New York Code of Professional Responsibility requires that a lawyer preserve the confidentiality of a client's "secrets" and "confidences" and prohibits the lawyer's "use [of] a confidence or secret of his client to the disadvantage of the client." DR 4-101(B)(1), (2). A "confidence" refers to information protected by the attorney-client privilege and a "secret" is defined as:

other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely to be detrimental to the client.

DR 4-101.

The lawyer's duty to maintain the confidentiality of a client's communications is one of the most solemn and significant governing attorneys, including those communications which, if disclosed, would be detrimental to the client's case or subject the client to liability. See, e.g., N.Y. City 1986-7; N.Y. City 1986-8; N.Y. City 82-17 (the communications by a client to his attorney that he made misrepresentations to the

opposing party prior to his lawyer's retention "are protected as 'secrets' under the Code since they are information gained in the professional relationship that would be embarrassing or harmful to the client if disclosed."); N.Y. City 82-39 ("A lawyer may not disclose information received during an initial consultation with a potential client who revealed that she has previously embezzled funds"); see also N.Y. State 525 (1980).

While the Code requires a lawyer to preserve the confidences of his client, the Code also places a special duty on government lawyers to act justly and to ensure that a full record is developed:

A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlement or results.

EC 7-14.

The Committee is of the opinion that EC 7-14 does not, however, require a government lawyer who also represents a private citizen in civil actions or administrative proceedings to disclose confidential communications to the adversary. In these circumstances, the government lawyer is not functioning primarily on behalf of the sovereign as does a prosecutor. Instead, the lawyer's obligations to the individual client are paramount, thus requiring the lawyer to preserve the confidences and secrets of the client.

In that light, a recent opinion issued by the Bar Association of Nassau County, although not directly on point, is instructive. There, the Association found that an attorney, who worked for a not-for-profit public interest organization, which paid the lawyer's fees and provided cost-free legal services to the public, was not required to disclose the client's confidences to either the organization or to his adversary. The Association stated:

[The attorney] owes a duty of confidentiality to the client, and such representation takes priority over the attorney's duties to the employer. The party who is rendered legal services, rather than the party who pays the legal fees, is the client . . . [In view of] the attorney's duty to maintain the confidentiality and secrets of his client, [he] should seek to quash [a] subpoena [served by his adversary].

Nassau Cty. Ops. 82-5, 82-6.

B. The Committee is of the opinion, however, that where the failure to disclose the materially adverse information would, directly or indirectly, and in light of the circumstances, mislead the Tribunal, then Lawyer X should seek his client's consent to disclose the information.

DR 7-102(A) states in part:

In his representation of a client, a lawyer shall not . . . (3) Conceal or knowingly fail to disclose that which he is required by law to reveal; (4) Knowingly use perjured testimony or false evidence; [or] (5) Knowingly make a false statement of law or fact.

These provisions reflect the principle that affirmative misrepresentations, or representations that are misleading in light of the circumstances, should not be made to the Tribunal. Lawyer X may not therefore withhold the information from the Tribunal if nondisclosure would be false or misleading under the circumstances and should therefore seek to obtain the consent of his client to disclosure. If counsel does not receive such consent, he should seek permission to withdraw. n1

n1 See N.Y. County 106 (1916) (lawyer should decline employment if he would otherwise have to conceal facts from the court about the existence of a prior divorce decree).

The Committee is of the opinion that the exception engrafted upon DR 7-102(B)(1) of the Code n2 does not relieve an attorney of the obligation, in a civil case, to be candid with the Tribunal if asked, directly or indirectly, about the subject

matter of the confidence or secret, or if something said at the hearing or trial would be misleading if the information were not disclosed. Accordingly, if consent to disclose under these circumstances cannot be obtained, counsel, as noted above, should withdraw. n3

n2 DR 7-102(B)(1) states (emphasis supplied):

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret.

n3 The opinion in N.Y. State 454 (1976) is instructive. There, it was held that a lawyer who had withdrawn from the representation of his client did not have the ethical obligation to disclose that his client had concealed assets which should have been turned over to a trustee in a bankruptcy proceeding. While it is not clear from the opinion whether the lawyer was faced with making affirmative misrepresentations or misleading statements to the Tribunal, the attorney apparently withdrew when consent could not be obtained from his client to disclose his client's actions.

II. The Second Inquiry

The Committee's response concerning this aspect of the inquiry is premised on the assumption that it is fairly understood by the parties that Lawyer X was acting as counsel only for the agency. Where Lawyer X makes affirmative representations, or otherwise communicates to the complainant, that he is acting only on behalf of the agency, and not as counsel for the complainant, then the communications to Lawyer X are not privileged. See United States v. Demauro, 581 F.2d 50, 55 (2d Cir. 1978). In this situation, Lawyer X's ethical obligation, as a government

lawyer, to develop a "full and fair record" and "to seek justice", should prevail. n4

n4 The government lawyer's ethical obligation to assist the Tribunal in the search for justice is well settled and requires the government lawyer, in an appropriate case, to take actions which are detrimental to his position or even to dismiss the action if it is deemed wholly to lack merit. See DR 7-103(B) (government lawyer in criminal case has duty to disclose to defendant exculpatory evidence); Jones v. Heckler, 583 F. Supp. 1250 (N.D. Ill. 1984) (court stated that it would have been professionally responsible for the government attorneys to submit "a confession of error" in the lawsuit considering the feeble support for the government's case); Amato v. Krob, slip. op. (Ohio Ct. App., 8th Dist., Sep. 8, 1983) (counsel for the City's safety director "should not decline to assist the Commission in complying with appellate procedures, even if his silence benefits his government client.").

However, the Committee is of the opinion that where it is clear, based upon the facts and circumstances, that the complainant views Lawyer X as his counsel for purposes of representation in the discrimination case, and Lawyer X acts accordingly, the materially adverse information was communicated by the complainant to Lawyer X within an attorney-client relationship and should not be disclosed, see In re Grand Jury Proceedings, Detroit, 434 F. Supp. 648, 650 (E.D. Mich. 1977), aff'd, 570 F.2d 562 (6th Cir. 1978).

The foregoing is subject to the limitation, discussed in Part I.B above in connection with the first inquiry, that misrepresentations or misleading statements need not be made to the Tribunal. In that circumstance, the Committee's opinion is that counsel for the agency should withdraw, see DR 2-110(C)(1)(b), and no new counsel employed by the agency should be substituted. We realize that such a conclusion would require the complainant to retain private counsel to prosecute his discrimination case, or in some instances, would require the complainant to appear pro se. This result is compelled, however, by the irresolvable conflict between the competing

duties of Lawyer X -- a conflict created by the complainant's own conduct.

For the foregoing reasons, the Committee answers the first inquiry in the negative and the second inquiry in the affirmative, subject to the conditions described herein.

CITY UNIVERSITY OF NEW YORK BYLAWS

Section 1.10. PUBLIC HEARINGS.

a. The board shall schedule public hearings on the adoption of its expense budget, capital budget, and master plan. The board in the exercise of its judgment may schedule such other hearings as it may determine.

b. The board shall hold a public hearing on the agenda of a regular meeting no less than three days before the meeting. Upon notification received by the secretary one day in advance of the hearing, persons will be permitted to speak to items on the agenda and to submit written statements relating thereto. The chairperson, or the vice chairperson in the chairperson's absence, shall assign one or more board trustees to conduct such hearing. A substantive summary of written statements received at such hearings shall be distributed to the trustees of the board prior to the regular meeting.

Section 5.2. WAIVER OF THE BYLAWS.

Any provision of these bylaws may be waived at any meeting of the board for some special purpose by the affirmative vote of nine trustees of the board

Section 9.1. DEPARTMENT ORGANIZATION.

a. Each department, subject to the approval of the faculty or faculty council, where existent, and subject to the provisions of other sections of these bylaws, shall have

control of the educational policies of the department through the vote of all of its members who have faculty rank or faculty status; and if the department so desires, it may enfranchise persons in visiting professorial titles and other members who have been appointed on an annual salary basis for a first or second year of full-time service to vote on departmental matters except for the election of department chairpersons, departmental committee on personnel and budget, or departmental committee on appointments. Each department shall cooperate with related departments and with college agencies in general in the development of college-wide interests.

b. The executive officer of the department shall be the department chairperson who shall be a professor, associate professor or assistant professor elected by secret ballot for a term of three years, except as provided below, by a majority vote of all the members of the instructional staff of the department who have faculty rank. Proxy or mail voting shall not be permitted. The department chairperson must be tenured or have been approved by the board for tenure at the time of his/her election, except in departments less than seven years old. Such elections shall be subject to the subsequent approval of the president and the board. The present system of staggered departmental elections shall be continued. The successors of department chairpersons shall be elected during the first full week in May at the expiration of the respective terms of office to take office as of July first of the year in which they are elected and at the three year intervals thereafter. Vacancies shall be filled by election for the unexpired term. Notwithstanding anything in the foregoing to the contrary, in the library department, the president of the college shall from time to time recommend a member of the department to the board for designation as chairperson. Department chairpersons who are not tenured professors, associate professors or assistant professors on January 1, 1976 may

fill out their unexpired terms as chairpersons, subject to the provisions of sections 9.1. (c) and 9.6. (a) of these bylaws.

c. In any case where the president does not approve the election of a department chairperson, or at such other time as the interests of the college may require the removal of a chairperson and the appointment of a new one, he/she shall confer with the department and thereafter shall report to the board any subsequent action by the department with respect thereto, together with his/her own recommendation for a chairperson. The recommendation by the president to the board for the designation of the department chairperson should take place only after careful consideration by the president of the qualifications of those selected by the respective departments. The president shall base his/her recommendation on the capacity of the individual selected to act effectively as the departmental administrator and spokesperson and as a participant in the formation, development, and interpretation of college-wide interest and policy.

Section 9.3. DUTIES OF DEPARTMENT CHAIR-PERSON.

a. The department chairperson shall be the executive officer of his/her department and shall carry out the department's policies, as well as those of the faculty and the board which are related to it. He/she shall:

   1. Be responsible for departmental records.

   2. Assign courses to and arrange programs of instructional staff members of the department.

   3. Initiate policy and action concerning the recruitment of faculty and other departmental affairs subject to the powers delegated by these bylaws to the staff of the department in regard to educational policy, and to the appropriate departmental committees in the matter of promotions and appointments.

4. Represent the department before the faculty council or faculty senate, the faculty, and the board.
5. Preside at meetings of the department.
6. Be responsible for the work of the department's committee on appointments or the department's committee on personnel and budget which he/she chairs.
7. Prepare the tentative departmental budget, subject to the approval by the department's committee on appointments or the department's committee on personnel and budget.
8. Transmit the tentative departmental budget to the president with his/her own recommendations.
9. Arrange for careful observation and guidance of the department's instructional staff members.
10. Make a full report to the president and to the college committee on faculty personnel and budget of the action taken by the department committee on personnel and budget or department committee on appointments when recommending an appointee for tenure on the following:
    a. Teaching qualifications and classroom work.
    b. Relationship of the appointee with his/her students and colleagues.
    c. Appointee's professional and creative work.
11. Hold an annual evaluation conference with every member of the department after observation and prepare a memorandum thereof.
12. Generally supervise and administer the department.

Section 9.7. APPOINTMENTS.

a. Recommendations for appointments in a department shall be initiated (1) by the department or (2) to a professorial title by the president pursuant to his/her responsibilities in accordance with section 11.4. of these bylaws. The president may recommend that such appointee be designated as department chairperson. Such recommendation by the president for appointment and designation as department chairperson may be made either at the time of election of department chairperson or at such other time as the educational interests of the college may require. Before recommending such appointment or designation, the president shall confer with the members of the department and with the college committee on faculty personnel and budget.

Section 11.4 THE PRESIDENT. A. Position Definition: the president with respect to his educational unit, shall:

a. Have the affirmative responsibility of conserving and enhancing the educational standards and general academic excellence of the college under his/her jurisdiction. Such responsibility shall include but not be limited to the duty to recommend to the board for appointment, promotion, and the granting of tenure only those persons who he/she is reasonably certain will contribute to the improvement of academic excellence at the college. These recommendations shall be consistent with the immediate and long range objectives of the college.

b. Have the power (1) to remove a department chairperson in accordance with section 9.1c; and (2) to initiate recommendations for appointment in a department to a professorial title in accordance with section 9.6a.

c. Be an advisor and executive agent of the board and have the immediate supervision with full discretionary power to carry into effect the bylaws, resolutions and policies of the board, the lawful resolution of any of its committees, and

the policies, programs and lawful resolutions of the several faculties and students where appropriate.

d. Exercise general superintendence over the concerns, officers, employees and students of his/her college, prepare and implement the college master plan.

EX PARTE CONFERENCE TRANSCRIPT

Court: Did you all move for summary judgment with respect to ---- I think I know your answer ---- with respect to the '91 retaliation claims? And the answer is no, you didn't because you didn't have time to, right?

Banks: Correct. They were really part of the case, to my knowledge, until ----

Court: Until they became part of the case.

Banks: ---- the motion for reconsideration. And, therefore, we did as good of a job as I could in the motion *in limine.*

Banks: Right.

Court: What I'm thinking about is to request a proffer by way of summary judgment, but a proffer as to the proffer with respect to the '91 retaliation claims before we get a jury. I mean I see sort of a procedural problem, but we all know how this came to pass. And it seems to me that that would be, that might be appropriate. I don't know whether you have ---- you all might want to think about the procedural setting in which we find ourselves. But the other thing I might do would be to defer the jury, the '91 retaliation in order to give you time to make a motion for summary judgment with respect to that.

Banks: We would welcome that opportunity.

Court: Well, I'm sure you would. I'm just thinking about the procedural situation which is of my own making, obviously, I don't think a motion *in limine* does it for a cause of action is really what I'm trying to say. Maybe that would be the better way to go about it. That means briefing and all that. Why don't you give some thought as to ---- I'm sure we're not going to find a procedural answer. I don't see how, except maybe to put it over and then give you an opportunity to move to dismiss those claims on the summary judgment basis.

Banks: Your Honor, we would welcome that opportunity.

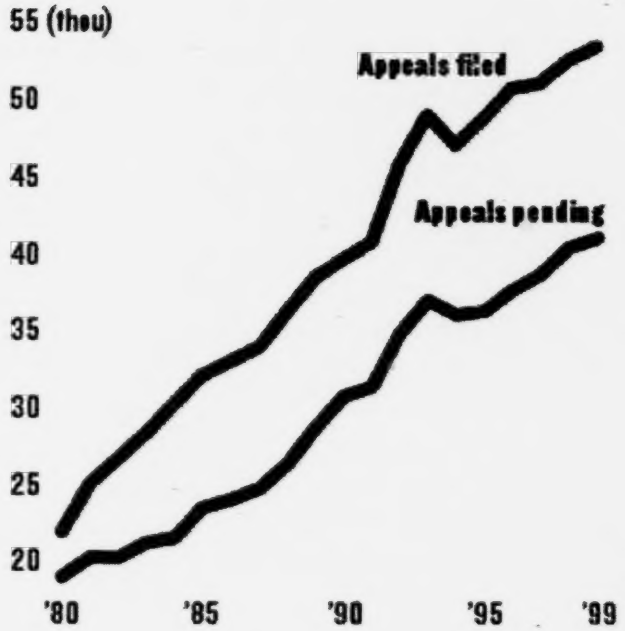
Tr., Vol. 2, p. 207, line 25 to p. 209, line 22.

Forbes Magazine, *Justice in The Dark*, October, 30, 2000

Appeals courts are giving short shrift to cases-and not just frivolous ones.

79% of almost 27,000 federal appeals decided on merits last year;
24% of the 1998 cases close enough that a judge wrote a dissenting opinion;
37% of cases that reversed the trial court, a sign the law wasn't clear.
43% of cases in the New England circuit, and Puerto Rico.
90% of cases in the circuit including maryland, virginia, the carolinas.

Unpublished decisions haven't reduced the backlog, and the number of appeals continues to rise.



THREE YEARS AGO A FEDERAL jury acquitted Vicki Lopez-Lukis, a former commissioner in Lee County, Fla., of bribery for letting her lover, a Goldman Sachs lobbyist, reimburse her for their personal phone calls. But, bizarrely, the jury convicted her of one count of using the mails to deprive her constituents of "honest services" in connection with the same alleged bribery. This didn't make any sense, so she appealed to the 11th Circuit Court of Appeals. But in a one-word decision--"affirmed"--the appeals court rejected her argument.

Blind justice? For Lopez-Lukis, more like justice in the dark. She has no idea what the appellate judges were thinking when they brushed aside the obvious inconsistency in the verdict. Forget further appeals. The Supreme Court rarely accepts cases for review--only 124 of 8,445 sent to it in the 1999-2000 season--and almost never accepts one if there is no published opinion to look at. Lopez-Lukis is serving a 27-month term in Coleman federal prison near Orlando.

Last year federal appeals judges disposed of 79% of the 26,819 cases they decided by issuing so-called unpublished

decisions, up from 37% in 1977. Over 7% of the unpublished decisions consisted of a single word. Whether curt or long-winded, an unpublished decision isn't precedent. That means the judges can be sloppy. They are not accountable for illogic or inconsistency in the rulings.

"This is judges disobeying the law," says William Richman, a University of Toledo law professor who has studied the problem.

At last, one federal appeals court has declared war on the practice. In August, in a case involving a late-filed tax refund claim, a three-judge panel in St. Louis, Mo. branded unpublished decisions unconstitutional. Despite the ruling, the taxpayer lost her refund.

The reasoning behind this momentous decision was that judicial decisions are intended not just to resolve particular disputes but also to tell Americans what the law is. So every decision must be a precedent. Though that decision is itself a precedent only in the 8th Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska and the Dakotas), litigants in other federal courts are starting to cite it. The Supreme Court will likely end up ruling on the matter.

The shortcut system began in the late 1960s when judges were struggling to deal with an avalanche of social-justice litigation as well as a parade of *pro se* litigants from the jailhouse. True, the appellate backlog does get scary at times. But does this justify lazy law? "[Unpublished decisions] are not prepared with the same kind of exactness," admits Procter R. Hug Jr., chief judge of the 9th Circuit on the West Coast, though he contends that they are still sound.

Judges insist that they issue unpublished decisions only in simple, noncontroversial cases, where the answer is clear cut. The statistics say otherwise. Appeals courts issue unpublished decisions in 24% of the cases where various judges disagree so much that one writes a dissenting opinion, and in 37% of the cases where they're reversing the trial court.

The 9th Circuit Appeals Court recently saw proof that unpublished decisions mask plenty of inconsistency. The court had affirmed the conviction of Pablo Rivera-Sanchez, an

illegal alien who sneaked back into the U.S. after being deported. His lawyer found, though, that the court had in the past issued 27 separate unpublished decisions applying three different rules to the same immigration issue.

Consider how unpublished decisions have nearly driven out of business Beehive Telephone, a Wendover, Utah-based rural phone company. Last year the Federal Communications Commission cut Beehive's rates by 66%. An appeals court, swayed by the FCC's claim that Beehive had made a procedural error that barred appellate review, refused to hear the case.

Beehive lawyer Russell Lukas dug up an earlier decision by the same court that said even if a company makes that error--which he insists Beehive did not--it doesn't disqualify an appeal. But Lukas couldn't cite one of the key cases--it was deemed unpublished. Completing the insult, the appeals court ruled against Beehive in another unpublished decision only one word long. "They can't justify what they're going to do, so they don't publish it," says Lukas, who works out of Washington, D.C. He asked the Supreme Court for review, but naturally, was denied.

Alcan Aluminum, the Ohio subsidiary of the Canadian-based giant Alcan Aluminium Ltd., was the victim of a court's unpublished opinion that directly contradicted its earlier decision in the same case. A federal court in Philadelphia held Alcan liable in 1991 for part of the cost of cleaning up Pennsylvania's Susquehanna River after a spill. An appeals court kicked the case back to the lower court, saying in a published decision that Alcan would be off the hook if it could show that its emulsion hadn't caused the pollution. Though Alcan proved that its waste hadn't caused the harm, the lower court still found it liable, applying a new and impossibly high standard. The company appealed again, to the same appellate court, but this time the judges batted it down with one of those one-word grunts. Penalty, $500,000.

There are better ways to deal with backlogs. Congress might appropriate the money to pay for more judges. Or

perhaps shrink the overpowering role of federal law in our lives.

City of New York
COMMISSION ON HUMAN RIGHTS
40 Rector Street, New York, NY 10006

MEMORANDUM

To: File
From: Matthew Nowkowski, Human Rights Specialist
Subject: Case Summary
Dianne [sic] Sank v. CUNY/City College of New York
Bernard Harleston, President
EM00457-08/24/88-DE, as amended
Date: July 24, 1991

SUMMARY OF THE COMPLAINT

Complainant, who is female, white and a victim of retaliation charges Respondents with discriminatory practices with regard to employment.

Specifically, Complainant alleges that she was denied equal terms and conditions of employment and removed as department chairperson due to discriminatory reasons based upon her sex, race and color and due to retaliation.

SUMMARY OF THE RESPONSE

Respondents deny Complainant's charge of discriminatory practices. Further, Respondents assert that Complainant's sex, race and color were not factors in her removal as department chairperson. Respondents deny Complainant's allegations that she has been retaliated against for having opposed Respondents' practices.

SUMMARY OF THE INVESTIGATION

The investigation consisted of a review of documentation submitted by both parties, interviews of Complainant and witnesses

and a fact-finding conference. The complaint was filed October 21, 1988 and amended three times.

[page 2]

Complainant alleges and Respondents admit that she is a faculty member at the Department of Anthropology of Respondent City College. In or about May, 1987, Complainant was elected department chairperson effective July 1, 1987. Complainant alleges and Respondents admit that on or about April 27, 1988, she received a letter from Respondent Harleston, non-white and male, removing her as the elected chairperson effective June 1, 1988. This letter informed Complainant that her removal was "in the interests of the college."

Complainant alleges that the administration, even though it was made aware of and had knowledge of the maladministration of her predecessor (a male) did not admonish him or remove him as the department chairperson.

Respondents deny the above-stated allegation. The investigation revealed that there was an Outside Review Committee (ORC) that reviewed the anthropology department at the behest of the administration. The ORC issued a report which specifically outlined the maladministration of Complainant's predecessor. Moreover, the ORC noted that the administration was aware of the problems and maladministration of the former chair. However, the former chair (male) was not removed and Complainant was removed. It should be noted that Complainant was never accused of maladministration; nor was she accused of malfeasance during her tenure as a chair.

Complainant alleges that upon information and belief, the President has not removed similarly situated male department chairpersons even though their departments received negative evaluation from the ORC.

Respondents deny the above allegation. Respondents "affirmatively state that since the inception of City College's outside review process of its departments in 1987, no department review has resulted in the recommendation that a department chair be removed except for the instant case" (see Respondents' Answer, paragraph 5).

The investigation showed that Complainant was the only chair removed as a result of the ORC process. However, this investigator reviewed the findings of ORC reviews of several departments and many were critical of the various department

chairs, (see memo to file). Further, Professor John Dean of the Architecture Department was removed by the President in 1982, Mr. Dean was afforded the opportunity of resigning before an official removal by the President. The ORC report regarding-the anthropology department also called for the removal of the department secretary (female). This recommendation was not followed which may indicate that the President had discretion regarding implementing the ORC reports. A review of the ORC report for the computer science department shows that although

[page 3]

there was not a recommendation to remove the chairperson, a number of faculty asked the President to remove a duly elected chairperson. The President refused this request.

Complainant alleges that the acting department chairperson appointed to replace her is a black male. Upon information and belief, two female candidates who were suggested and are both better qualified, were not interviewed and considered for the acting chairperson position. Affirmative action procedures require proper advertising for all positions and Complainant alleges that these procedures were not followed.

Respondents admit that a black: male wad appointed to replace Complainant. Respondents assert that a majority of the anthropology faculty recommended Complainant's successor, Dr. Jones. Further, Respondents state that affirmative action procedures are not required to fill interim positions.

The investigation shows that Complainant was replaced by a black male, Dr. Jones, of the CUNY Graduate Center. Further, a search was conducted and ultimately, a white female was hired as the department chair. In normal hiring situations, CUNY follows affirmative action procedures when filling positions. These procedures were not followed when Dr. Jones was appointed. The three candidates included Dr. Jones and two white females. The President stated, at the Commission fact-finding conference, that he did not interview the two white females, but decided to appoint Dr. Jones because he was available.

Complainant alleges that the President refused and failed to accord her equal privileges of office as are accorded similarly situated male department chairpersons. In or about February and March, 1988, the President denied Complainant's requests for a meeting and he denied the college Ombudsman's request for a meeting.

Respondents deny the above allegation and state that the President and administration were aware of Complainant's views regarding her removal as chairperson.

The investigation reveals that the Ombudsman, Bruce Newling, wrote a letter, dated May 11, 1988, chastising the President for failing to meet with him and Complainant regarding her removal. The President also admitted that he failed to meet with Complainant about her removal. This is in contrast to the situation concerning Professor John Dean. Dean Morris Silverberg informed the investigator that the President met with John Dean to work out a "deal" so he could resign as head of Architecture; thus, sparing John Dean the negative impact of a forced resignation.

Complainant alleges that contrary to the standard practice of referring to elected department heads as "chair" or "chairperson," the President unmasked his bias towards females by

[page 4]

consistently referring to Complainant's position as "chairman" in his correspondence with Complainant, her department and with the University Chancellor (plus omitting Complainant's name from the latter's correspondence).

Respondents deny Complainant's allegation and state that there is no established policy regarding the usage of "chairman" or "chairperson."

Complainant submitted documents which shows that she was addressed as "chairperson" by members of the faculty and administration except for the President. Letters directed to Complainant and signed by the President specifically use "chairman." Although it is more accepted to use a genderless form of address, the President was not violating Respondents' policies in using "chairman." The investigation was not able to substantiate Complainant's charge that this is a deliberate and premeditated form of sexism.

Complainant alleges that upon information and belief most permanent appointments by the President during his tenure have been males and there has been very few appointments of females to administrative positions.

Respondents deny the above allegation and assert that the President appointed several females to high administrative posts.

The investigation relied on a list of appointees submitted by Complainant because Respondents were not able to produce a complete and accurate list of presidential administrative

appointments due to staffing constraints. Basically a review of the President's administrative appointments shows that of the permanent appointments 77% were male and 23% were female. Acting (temporary) appointments consisted of 80% males and 20% females. The aforementioned statistics represent appointments made during 1987-1989 and are shown in the college's catalog. The investigator secured a copy of an affirmative action report written by the former director of affirmative action. The report was issued in 1985 and specifically addresses the problems of recruitment and appointment of qualified females at CCNY. CCNY is compared to other colleges in the CUNY system and lags significantly in the appointment of females to positions of authority in the administration.

FIRST AMENDED COMPLAINT

Complainant alleges that the acting department chairperson appointed to replace her is a black male. This allegation was previously discussed, supra.

[page 5]

Complainant alleges that upon information and belief, most permanent appointments by the President during his tenure have been black males.

Respondents deny the above allegation and affirmatively state that Complainant's election as chairperson was approved by the President in May, 1987.

The investigation reveals that during the specific time of the complaint (1987-1989) the President appointed 12 black males to permanent positions in the administration and 8 white males. The statistics are lower for permanent administrative posts for females: 1 black female was appointed, as well as 5 white females.

Complainant alleges that upon information and belief, the President has a publicly stated policy of bias in favor of black males.

Respondents deny the above allegation and assert that "the President's policy with regard to recruitment and employment at City College is that expressed in the City College Equal Opportunity Policy statement" (see Respondents' Answer).

The investigation shows that one of the President's commencement speeches stated that the education of black males is one of the most important responsibilities of CCNY. It appears that Complainant may have interpreted this speech as a policy statement

regarding the hiring, retention and appointment of black males to positions of authority within the administration.

SECOND AMENDED COMPLAINT

Complainant alleges that in or about May, 1989, she was denied a request for a one semester leave with pay. According to her union contract, she should have been afforded "special consideration" for leave, since she has not taken leave in 21 years. Upon information and belief, the President was influential in the denial of her leave request.

Respondents admit Complainant's charge that her leave request was not approved and deny that the President was influential in the decision to deny her leave.

The investigation shows that under the contract between the faculty and CCNY, paragraph 25.5 states that: "Special consideration shall be given to those applicants who have not had a sabbatical leave or fellowship in fourteen (14) or more years," The investigator interviewed Professor Besmer, who was acting chairperson subsequent to the tenure of Professor Jones. He also served on the committee which reviewed Complainant's application for a leave. He states that the Complainant's leave proposed was not as compelling as the others which were submitted. However, Complainant counters that Besmer was one of the faculty who

[page 6]

applauded her dismissal as chairperson; therefore, his testimony is tainted. Professor Besmer did not refer to Complainant having received "special consideration" because of her many years of service without requesting a leave. Further, it appears that the President was not directly involved in the decision to grant a full-pay leave. There is only circumstantial _____ with the denial of leave and Complainant having filed her complaint and the amendments thereto.

Complainant alleges that on or about July 27, 1989, she discovered that her research lab was going to be moved to another room. This move was supposed to be carried out from July 21 through July 24, 1989. On or about July 28, 1989, Complainant discovered that her lab had been packed and moved to a storage room. Complainant alleges that she was not informed of this move in a timely manner and upon information and belief, the President was responsible for the decision to move her lab. As a senior, tenured, full-professor, Respondents should have made every effort

to accommodate Complainant's research work and notify her in a proper way of the removal of her lab.

Respondents deny any knowledge of when Complainant may have been notified about the moving of her lab and assert that efforts were made to accommodate Complainant. Respondents deny that retaliatory animus was the motivating factor in its decision to relocate Complainant's lab.

Complainant submitted the letter and envelope she received notifying her of the removal of her lab. Although the letter was dated July 20, 1989, the envelope was postmarked July 27, 1989. Complainant's lab was moved prior to July 27, 1989. However, the investigation was unable to ascertain the exact date of the move. According to Respondents, the workers involved in the move took pictures of Complainant's lab and made entries into a journal titled "mover's log." However, Respondents did not produce the log or the photographs because they were "lost." One of the workers involved in the move informed the CCNY faculty senate that he had never photographed a move at CCNY until the removal of Complainant's lab. Further, Respondents state that Complainant's lab was taken to provide the computer science department with two contiguous spaces. This reasoning is not supported by the chair of the computer science department: he informed the investigator that he was shown other non-contiguous rooms and had approved them. Later, in or about June or July, 1989, Vice-President Rodriguez decided that instead of non-contiguous rooms, the computer science department would receive Complainant's lab and an adjacent classroom. Further, the planning committee issued a list of space to be reallocated at CCNY at the termination of the spring, 1989 semester. Complainant's lab (room 7105) was never listed as a space to be reassigned. Respondents argue, interalia, that Complainant was not using her space and the equipment therein was boxed. Complainant counters that hers was an active lab; continual theft required her to keep her work in boxes. Regarding the issue of

[page 7]

notice, Complainant maintains that she was home during the summer break and could have been reached by telephone. Complainant states that she never received a telephone call. It appears that no other senior, tenured professors have had their labs moved at Respondents' facilities, without their knowledge and consent.

Complainant alleges and Respondents admit that on or about July 31, 1989, she discussed the moving of her lab with Vice-President Rodriguez. Mr. Rodriguez refused to give Complainant her lab, nor would another location be considered.

THIRD AMENDED COMPLAINT

Complainant alleges that in or about September, 1989, Respondent Chair Fremont Besmer, male, informed her by memo that she had to transfer her research computer to the department. Upon information and belief, Respondent Besmer wants Complainant' 5 computer for his own personal use.

Respondents deny the above allegation and assert that Complainant is not using the computer and the computer was not purchased with outside research funds. Further, Respondent Besmer asserts that the computer is targeted for use by the department's graduate students.

The investigation shows that, to date, Complainant has not surrendered the computer to the department. Complainant admits that the computer is not being used because of the disruption caused by the removal of her lab. Complainant maintains that the system was not purchased with tax levy funds. The discussion may be moot, since Complainant is still in possession of the computer. However, Complainant is adamant that it is further retaliation by the administration.

Complainant alleges that there is a computer in the anthropology department's office that is underutilized. The investigation revealed that the department received a new computer in or about 1990 and it is installed and in use.

Complainant alleges and Respondents admit that Respondent Besmer informed her that a consensus of the executive committee of the department decided to request the computer. Although Complainant denied that this is true, Respondents submitted information showing that a majority of the department's executive committee agreed, on two separate occasions, to request that Complainant return the computer.

Complainant alleges that Respondent Besmer has refused to request a computer from the Dean's office, even though several computers are available. The investigation revealed that as discussed, supra, the department was given a new computer in 1990.

Complainant alleges that upon information and belief, Acting Chair Besmer's attempt to take my research computer is way of expressing his gratitude and indebtedness to President Harleston, for the latter's role in appointing, affirming and retaining him as the interim/acting chair of the Department of Anthropology.

The College's January 13, 1988 Outside Review Committee's Report, which the College used to remove Complainant as Chair, strongly recommended that no one within the Department serve as Chair. However, Respondent Besmer was appointed Chair by the President, in direct opposition to the Committee's recommendations. Therefore, Complainant believes that the College's reason for her forced removal as chair is preteuxtural [sic] for discrimination, based upon her membership in a protected class.

Basically the above allegation is a continuation of previous allegations lodged by Complainant. Complainant was removed by the President under the pretext of a recommendation [sic] ORC that no one from the within the department could serve as chair. Complainant was replaced by a black male and he resigned. President Harleston appointed Respondent Besmer, a white male, who is a professor. Thus, Respondents contradicted their own stated reasons for removing Complainant as chairperson: that no one within the department could or should serve as chair.

CONCLUSION

The investigation uncovered evidence, based upon the testimony of Complainant and several witnesses, as well as documents submitted by both Respondents and Complainant, that supports Complainant's allegations that she was denied equal terms and conditions of employment, removed as chairperson and retaliated against due to discriminatory practices based upon her sex, race and color.

Complainant was elected chairperson of her academic department in May, 1987. Complainant's term of office commenced July 1, 1987 through June 30, 1990.

Complainant did not serve a full term. Complainant was removed from office by direct order of the President, who is a named Respondent. Respondents instituted a review of its academic departments by an Outside Review Committee (ORC). Complainant's department was reviewed in 1987 and ORC recommended that Complainant be removed, as well as the

departmental secretary, and a new chair be named from outside the college community.

The President removed Complainant via a letter that referred to her as "chairman." The President did not remove the secretary. Complainant was replaced by a black male professor, Dr. Jones, of the CUNY Graduate Center. Complainant was refused

[page 9]

a meeting with the President and she was not allowed to resign her position as chairperson. This is in direct contrast to a male professor, Dr. John Dean, who was head of the architecture department. The President allowed Dr. Dean to resign his position and this was confirmed by Dean Morris Silverberg.

Dr. Jones eventually resigned his position as chairperson. The anthropology department was allowed to elect one of its own, Dr. Besmer, to the position of chairperson. Complainant protested this move because of the lack of a quorum and the President responded by appointing Dr. Besmer. This was in contradiction to the recommendation of the ORC and against Respondents' reason for removing Complainant from her position.

Complainant alleges that the President favors black males in his permanent appointments and this was substantiated by public information available through the college catalog. During the 1987-1989 academic years the President appointed 12 black males, 8 white males and 1 Asian male to permanent position. During the same time period, the President appointed 1 black female, 5 white females and 1 Asian female to permanent positions.

Complainant filed three amendments alleging several retaliatory acts for having filed the instant complaint. Complainant alleges that she was denied a paid leave request, even thought she was due "special consideration" because of her length of service. There is no evidence linking the President to this decision, which was made by an academic committee composed of her peers.

Complainant alleged that her research lab was moved without notice and her consent thereto. It appears that Complainant received a letter, postmarked July 27, 1989, informing her of this move. Complainant went to the college on July 28, 1989 and discovered that her lab had been moved. Respondents state that it was necessary to give computer science two contiguous rooms. However, the chairperson of computer science stated that such a request was never made and Complainant's lab was never under consideration until early in July, 1989. Moreover, the original

mover's log and photographs of Complainant's lab were lost and never presented to the Commission, even though they were requested. The workman who took the pictures informed the faculty senate that he had never been asked to photograph another room until the removal of the lab. Although the computer science department was to have contiguous space, a door was not opened after the removal of the lab. The removal of Complainant's lab appears to be a unique situation: no other senior professor was so treated.

Complainant alleges that her department requested her research computer, as further retaliation. The investigation was unable to link this alleged act of retaliation with the President, nor was the investigation able to show how the computer was purchased (i.e. tax levy funds or research funds). Complainant still retains the computer for research purposes.

Thus, based upon the above discussion, there appears to be credibility issues that can only be resolved in a law enforcement bureau initiated settlement or public hearing.

RECOMMENDATION

Probable Cause

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Letter from Harleston to Sank, dated April 27, 1998

CCNY SEAL

THE CITY COLLEGE
OF
THE CITY UNIVERSITY OF NEW YORK
CONVENT AVE. at 138 ST.
NEW YORK, NEW YORK 10031

BERNARD W. HARLESTON April 27, 1988
PRESIDENT
Professor Diane Sank
Department of Anthropology
The College

Dear Professor Sank:

This is to inform you than it has been decided to discontinue you designation as Department Chairman effective June 1, 1988.

After carefully considering the advice given to me by the members of the Department at our meeting on February 29, 1988, discussing the situation with the Executive Committee of the Faculty Senate and the Executive Committee of the Faculty Council (CLAS), and weighing all factors including the contents of the Outside Review of the Department, I have decided that it is in the best interests of the Department and The City College to replace you as Chairman, effective June 1, 1988. The authority to remove a chairman is vested in the President by the Bylaws of the City University of New York.

I shall also act to appoint Professor Delmos Jones as Acting Chairman, effective June 1, 1988. for the period extending through the academic year 1988-89. During this time we shall conduct a national search for a Chairman.

While I realize this decision may be a personal disappointment to you, I would like to thank you for your efforts during the year and trust that you will work cooperatively with Professor Jones and the members of the Department as we strive to make major improvements during the year ahead.

Sincerely yours,
/S/
Bernard W. Harleston

BWH/MS/es

cc: Provost A. Charlene McDermott
Dean Arlene McCord
Dean Morris Silberberg